Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

OCTOBER TERM, 2002

MILFRED J. NUNEZ
Petitioner

v.

CLARENDON AMERICA INSURANCE COMPANY
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION OF MILFRED J. NUNEZ FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Given the judgment of the District Court that, due to the unique nature of the dredge and the work performed, Milfred Nunez was a seaman as a matter of law applied to uncontested material facts, did the conclusion of the Court of Appeals that Nunez, the dredge dump supervisor, did not have a substantial temporal relationship with the M/V DREDGE BATON ROUGE, thus reversing the District Court constitute an error of law and establish a conflict with the decisions of the Third Circuit Court of Appeals in *Shade v. Great Lakes Dredge & Dock Company*, 154 F.3d 143 (3d Cir. 1999) and *Foulk v. Donjon Marine Company, Inc.*, 144 F.3d 252 (3d Cir. 1997) and the decisions of the Ninth Circuit Court of Appeals in *Delange v. Dutra Construction, Co., Inc.*, 183 F.3d 916 (9th Cir. 1999) and *Lorimer v. Great Lakes Dredge & Dock Company*, 2002 U.S. App. LEXIS 10775 (9th Cir. 2002), and *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 137 L.Ed.2d 800, 117 S.Ct. 1535 (1997), *Chandris, Inc. v. Latsis*, 515 U.S. 347; 115 S.Ct. 2172; 132 L.Ed.2d 314 (1995), and *McDermott International, Inc. v. Wilander*, 498 U.S. 337; 111 S.Ct. 807; 112 L.Ed.2d 866 (1991)?

2. Did the holding that Nunez was not a seaman even though he spent all of his time in the service of the M/V DREDGE BATON ROUGE conflict with Ninth Circuit precedent that "a worker's duties take him to sea if they are 'inherently vessel related' or 'primarily sea-based activities'"?

3. Was the grant of summary judgment by the Court of Appeals upon consideration of the propriety of summary judgment on seaman status in favor of the injured seaman erroneous when there was countervailing factual evidence on the essential material facts found to be "uncontested" by the Court of Appeals and thus contrary to *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242

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(1986), which prohibit the resolution of credibility determinations in the contest of consideration of a motion for summary judgment?

PARTIES TO THIS PROCEEDING

Petitioner is Milfred J. Nunez, plaintiff in the District Court and appellee and cross-appellant in the Court of Appeals.

Respondent is Clarendon America Insurance Company, a defendant in the District Court and an appellant-cross-appellee in the Court of Appeals.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The decision of the Fifth Circuit appears at appendix A and is reported at 288 F.3d 271 (5th Cir. La. 2002). The denial of rehearing (App. B) is reported at 2002 U.S. App. LEXIS 10979. The District Court opinions appear at appendices C, D, and E. Only the first is reported at 108 F.Supp.2d 656; 2000 U.S. Dist. LEXIS 16530 (E.D. La. 2000). The others are unreported.

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. §§ 1254(1), 2101(c). The United States Court of Appeals for the Fifth Circuit rendered the decision attached on April 22, 2002. Rehearing was denied on May 21, 2002.

STATUTE INVOLVED

46 U.S.C. § 688(a) reads as follows:

Recovery for injury to or death of seaman

> (a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statues of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of

railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Petitioner, Milfred J. Nunez, is a seaman and a member of the crew of the M/V DREDGE BATON ROUGE and its associated flotilla of vessels (push boat, crew boat, flat boat, material barge) which were used to perform dredging projects for private employers and the Corps of Engineers at various locations in Louisiana and in Florida. Nunez was injured while in the course and scope of his seaman's duties as the dredge dump foreman.

A. The Consequences of the Decision Below

The decision of the Fifth Circuit unfairly granted summary judgment on appeal to deny seaman status to petitioner, who was a member of the crew of a dredge and support vessels, and who performed the essential service of supervising the soil disposal, after the District Court had granted summary judgment in his favor and despite the existence of material facts that should have required remand and a trial on contested issues of fact, thus removing the important factual issue of seaman status from the trier of fact.

B. Proceedings Below

As of September 4, 1997, the M/V DREDGE BATON ROUGE had been engaged for about three months in dredging a section of the Florida Intracoastal Waterway for the Corps of Engineers.

On that day, Nunez was at the dumpsite instructing his assistant, Brian Guillot, to add a pipe connection to prevent the dredged silt from going back into the waterway. Nunez testified that he tried to reach Guillot to assist him, but he started sinking

in the mud as he moved toward Guillot.[1] In order to escape, he climbed onto the back of a track hoe, but when he attempted to walk across the left track, the housing of the track hoe rotated, causing the body of the machine to hit Nunez's left shoulder and throw him approximately twenty feet in the air. Nunez suffered serious injuries as a result.

Nunez sued B&B and its insurer, Clarendon America Insurance Company, asserting claims for negligence under the Jones Act, and unseaworthiness, maintenance, and cure under general maritime law. B&B and Clarendon moved for summary judgment, arguing that Nunez was not a seaman under the Jones Act, which the District Court denied.[2] Nunez's motion for summary judgment on the same issue was granted, with the District Court holding that Nunez was a seaman as a matter of law.[3] After a trial, at which no evidence was adduced relating to seaman status because of the successful summary judgment, the court awarded Nunez damages and entered final judgment.[4] Clarendon appealed, and Nunez cross appealed the reduction of his award by the amount of a settlement with another defendant.

The United States Court of Appeals for the Fifth Circuit reversed the granting of Nunez's motion for summary judgment on seaman status and instead granted judgment in favor of the employer and its insurer.[5] The timely motion for panel rehearing was denied on May 21, 2002.

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[1] App. C., 16a.

[2] App. E.

[3] App. D.

[4] App. C.

[5] App. A.

C. Statement of the Pertinent Facts

At the time of the accident, Nunez had been employed as a crew member by B&B for approximately two years and was permanently assigned to the M/V DREDGE BATON ROUGE. Nunez began his work with B&B as a roustabout and an operator on the rig with occasional responsibility for running the crewboat. The dredge's crew consisted of two leadermen, who operated the barge; the crewboat operator; the dump foreman (the title which Nunez had at the time of the accident); and the roustabout, Guillot, who assisted the dump foreman. During the two years that he worked for B&B, Nunez performed repair work on a small, unnamed, twelve-inch dredge for approximately two months; assisted in the construction of the M/V DREDGE BATON ROUGE for approximately ten months and worked on dredging assignments on the Mississippi River and in Florida. Nunez worked twelve hour shifts when the dredge was in operation. He took vacation time when the dredge was being moved from one jobsite to another because he did not participate in transporting the vessel to the new dredge site.

Nunez traveled over water to and from the M/V DREDGE BATON ROUGE to report on the dump site's status and operated various B&B owned vessels. He occasionally ate his meals on the dredge; however, he did not sleep on the vessel during his employment because there were no living quarters.

At the Florida location, Nunez was required to lay ten miles of pipeline, which was carried to the site by barge and by truck as part of the project to dredge a section of the Intracoastal Waterway. The pipeline was ten miles long, because it snaked around corn and cotton fields that had to be avoided. His duties included operating a survey boat, operating a flat boat, operating a tugboat, fixing the pontoon line in the river between the dredge and the dump site, shifting the two swing anchors in the river to enable the vessel to move, building levees surrounding the dump

sites near the edge of the river, and loading and unloading pipe from the vessel during dredging operations. At least twice a day the crew and the dump foreman made the approximately hour-long trip between the vessel and the river bank.

The track hoe, which was positioned on land, was used to lift the pipe in a sling and transfer it to the banks of the waterway. When the dredge arrived, Nunez made pontoon connections between the pipeline and the cutter head on the dredge in order to pump out the Intracoastal Canal.

Nunez worked on the Florida assignment approximately eight weeks before he was injured. After the injury, he worked light duty operating a crew boat full time for the same employer until his employment was terminated.[6]

In his Affidavit, Milfred Nunez states:[7]

> During most of my two year employment with B&B, I held a position titled "dump foreman", and I was also an operator, a roustabout and a deck hand. I was responsible for the operations of the dump sites, whether they were ten miles inland or an island in the river. My duties also included operating a crew boat, operating a flat boat, operating a tugboat, fixing the pontoon line in the river between the dredge and the dump site, shifting the two swing anchors in the river to enable the dredge to move, building levees surrounding the dump sites near the edge of the river, and loading and unloading pipe from the dredge during dredging operations. I reported to my supervisor aboard the M/V DREDGE BATON ROUGE at least twice each day. My duties required me to be on a

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[6] This is nearly verbatim from the opinion and order granting summary judgment, footnotes omitted, Appendix D, 33a-34a.

[7] (R. 109, App. F, 42a-43a, emphasis added)

vessel from **10 to 60 percent of the time** I spent working on B&B projects.

Mr. Nunez's duties included building the dump sites, (R. 464), ultimate responsibility for the operation of the dump sites, (R. 323), changing dump sites, (R. 463), unloading and loading pipe from the barge, (R. 367) and repairing the pontoon line in the river. (R. 374, 459, 109). His duties required constant daily travel by vessel to and from the dredge from the dump site, as well as working in the area in the river between the shore and the dredge. (R. 381, 384, 459). For these reasons, Mr. Nunez had an assistant, Brian Guillot, who stayed at the dump site and used a radio to call him on the dredge regarding problems at the dump site. (R. 325). Mr. Nunez reported to his supervisor aboard the M/V DREDGE BATON ROUGE at least twice each day. Mr. Nunez was required to travel over the water from the shore to the dredge, and then from the dredge to the dump site every morning and evening during the project. (R. 739). The M/V BATON ROUGE was his base of operation.

Milfred Nunez's Affidavit concerning his duties that did not take place on land[8] is supported by the Affidavit of Roland Nunez, B&B's superintendent (R.738), who confirmed that Milfred Nunez came aboard the dredge M/V DREDGE BATON ROUGE three to four times each day to get instructions, and

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[8] The site of a seaman's injury, here at one of the dredge dump areas, does not affect recovery if the injured person is, in fact, a seaman. *Ardoin v. J. Ray McDermott, Inc.*, 641 F.2d 277, 282 (5th Cir. 1981). This is because Nunez's specific activity at the time of his accident is not dispositive of the issue of seaman status. *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 149 (3d Cir. 1998); *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (C.A.5 1983), cert. denied, 464 U.S. 1069, 79 L.Ed.2d 212, 104 S.Ct. 974 (1984). It is well established that the injury does not have to happen on the vessel. *Dean v. McKie Co.*, 771 F.Supp. 466, 471 (D. Mass. 1991).

traveled by vessel twice each twelve-hour shift to the dump site, which required him to be in a B&B vessel a minimum of an hour and a half and as much as three hours per shift (R.738). They both stated that Mr. Nunez worked full time on B&B's dredges (the twelve-inch dredge and the M/V DREDGE BATON ROUGE) during various repair projects that spanned from two weeks to two months, and regularly operated B&B crew boats, even on a full-time basis. (R. 109, 110, 738, 739.)

As Milfred Nunez explained, "the fewer problems that arose at the dump site, the more time I spent on the dredge or handling the pontoon line between the river bank and the dredge" which required him to be "trucking back and forth" to the dredge "on a little vessel." (R. 109 & 379:1.)

When the vessels were under repair between projects, Nunez worked on the B&B dredges one-hundred percent of the time getting them ready for the next project (R. 334:4-19, 339:17, 363:9-17, 364:1, 365:4). He operated the B&B crew boat and flat boat multiple times daily, and as much as one-hundred percent of his time on the job (R. 329:15, 331:15, 379:9, 354:8, 412:8-23).

His work required traveling over water on a crew boat to and from the M/V DREDGE BATON ROUGE for far more than ten percent of his work shift. (R. 325:19, 329:8-17, 332:10, 359:14, 367:10, 380:23, 412:11-20). Nunez was responsible for the pontoon line, which required that he work daily in the river on a crew boat, either making or fixing the pontoon line between the dredge and the shore, which, at least on one occasion, was twice as long as the pipeline on land (R. 348:17-25, 374:7-21, 459:19, 463:4).

REASONS FOR GRANTING THE WRIT

The Decision of the Fifth Circuit Court of Appeals, on an Important Federal Question, Conflicts With Decisions of This Court and With Those of Other Circuits.

A. The Issue as Framed by the Court of Appeals

It is uncontested that Nunez's job as dump foreman contributed to the function and mission of the vessel. An essential function of a dredge is to remove soil and silt from the seabed of the waterway where the dredge is working. That soil must be disposed of in an orderly fashion on the shore for the dredge to perform its function. Because Nunez was performing this essential job that allowed the dredge to perform her work, the first prong of the Supreme Court's seaman status test is satisfied. We therefore turn our attention to the second prong: whether Nunez's connection to the dredge BATON ROUGE was substantial in terms of both it [sic] duration and its nature.[9]

That court further stated that:

> Nunez points to the *Robison* test authorizing a finding that the employee has the requisite connection to a vessel if he was: . . . 'assigned permanently to a vessel. . .' or . . .'performed a substantial part of his work on the vessel.' He argues that this test is disjunctive and because he was permanently assigned to the dredge BATON ROUGE as the dump foreman the District Court correctly found that he had the requisite connection to a vessel. We disagree. This interpretation ignores the Supreme Court's teaching in *Chandris* that a seaman's connection with a vessel includes a temporal requirement, *i.e.*, that the worker spend a substantial part of his work time aboard the vessel. Were we to accept Nunez's argument, we would remove this requirement. In other words, Nunez would have us adopt a rule — contrary to *Chandris's* directions — that any worker whose duties contribute to the function or the mission of the vessel is a seaman without regard to

[9] App. A., 4a-5a.

> whether that worker ever sets foot on the vessel. Such an interpretation would introduce a host of land-based employees as potential Jones Act seamen simply because their work supports the vessel's mission.[10]

B. The Correct Resolution of the Substantiality Issue

In the District Court, Clarendon also argued "that Nunez's connection with the M/V DREDGE BATON ROUGE was not substantial because he worked ninety percent of his time on land."[11] However, the District Court concluded:

> Unlike *Loyd*, Nunez was a member of the crew, he played an integral part in connecting the pipeline to the dredge, and he worked on the waterway between the dredge and the dump site. Therefore, Nunez, unlike the plaintiff in *Loyd*, performed work that exposed him to the perils of the sea.
>
> Taking into account the unique nature of the vessel and the work performed, Nunez had a substantial connection to the vessel. The site of Nunez's injury and the necessity that the work of the vessel required Nunez to spend a large portion of his time on land does not bar him from his Jones Act seaman status. Accordingly, the motion for summary judgment is granted.[12]

On the other hand, the Court of Appeals simply accepted the Clarendon argument as uncontested, despite affidavit and deposition evidence to the contrary:

Although he traveled across water to the dredge twice a day to report to his supervisor and occasionally ate meals onboard, it is

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[10] App. A., 7a.

[11] App. D., 34a.

[12] App. D., 35a.

uncontested that Nunez performed ninety-percent of his work on land.[13]

The Fifth Circuit concluded:

> If we were to accept Nunez's argument, we would expand the ranks of potential Jones Act seamen to all land-based employees who further the mission or function of the vessel, from salesmen to payroll clerks to corporate executives. Neither the law of the Supreme Court or of this Circuit will permit such a bizarre result.[14]

This was error because Nunez was not a land-based employee. He was working "at sea" in the continuing service of the M/V DREDGE BATON ROUGE to whom he owed allegiance. He could not have been land based because there was **no** land base.

C. The Fifth Circuit's Decision Was Error and Conflicts With Decisions of Two Other Circuits and the Supreme Court

In applying the uncontested material facts, the District Court correctly concluded that, due to the unique nature of the dredge and the work performed, Nunez was a seaman as a matter of law. The failure of the Court of Appeals to affirm this decision under the undisputed facts found by the District Court constituted an error of law and establishes a conflict with the decisions of the Third Circuit Court of Appeals in *Shade v. Great Lakes Dredge & Dock Company*, 154 F.3d 143 (3d Cir. 1999) and *Foulk v. Donjon Marine Company, Inc.*, 144 F.3d 252 (3d Cir. 1997) and the decisions of the Ninth Circuit Court of Appeals in *Delange v. Dutra Construction, Co., Inc.*, 183 F.3d 916 (9th Cir. 1999) and *Lorimer v. Great Lakes Dredge & Dock Company*, 2002 U.S. App. LEXIS 10775 (9th Cir. 2002), and this Court's decisions in

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[13] App. A., 2a.

[14] App. A., 8a.

Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 137 L.Ed.2d 800, 117 S.Ct. 1535 (1997), *Chandris, Inc. v. Latsis*, 515 U.S. 347; 115 S.Ct. 2172; 132 L.Ed.2d 314 (1995), and *McDermott International, Inc. v. Wilander*, 498 U.S. 337; 111 S.Ct. 807; 112 L.Ed.2d 866 (1991)

Pretermitting for the moment the issue of whether or not only ten percent of Nunez's work was performed on the dredge itself, it is apparent that Nunez served on an identifiable fleet of vessels, which places him within the rule "allowing seaman status for those workers who have the requisite connection with an identifiable fleet of vessels, a finite group of vessels under common ownership or control." *Papai*, 520 U.S. at 556 and 560.

Jones Act coverage is confined to seamen, those workers who face regular exposure to the perils of the sea. An important part of the test for determining who is a seaman is whether the injured worker seeking coverage has a substantial connection to a vessel or a fleet of vessels, and the latter concept requires a requisite degree of common ownership or control. The substantial connection test is important in distinguishing between sea-based and land-based employment, because land-based employment is inconsistent with Jones Act coverage. This was the holding in *Chandris*, and we adhere to it here.[15]

In *Papai*, 520 U.S. at 555, this Court further noted:

> For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.

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[15] *Papai*, 520 U.S. at 560.

In *Wilander*, 111 S.Ct. at 817, this Court stated:

> The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. See *Maryland Casualty Co. v. Lawson*, 94 F.2d 190, 192 (C.A.5 1938) ("There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise"), cited approvingly in *Norton*, 321 U.S. at 573. In this regard, we believe the requirement that an employee's duties must 'contribute to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.

Plaintiff-Shade, like the roustabout assisting Nunez, was primarily a shoreman, although, like Nunez, Shade did other duties which contributed to the function of the vessel. Like Nunez, Shade presented evidence that he worked on other vessels in the dredging fleet. In denying a motion for summary judgment as a matter of law, the Third Circuit stated, 154 F.3d at 150:

> Additionally, even Shade's duties on the beach were not unrelated to the work of a vessel in navigation; instead, they contributed to the purpose of the dredging operation. Viewing this evidence in a light most favorable to Shade, a reasonable juror could find that Shade's job responsibilities at Cape May consisted of a single job assignment and contributed to the function of a vessel in navigation, thereby satisfying the first requirement of the *Chandris* test. Thus, because Shade presented sufficient evidence for a reasonable juror to find in his favor, the

District Court correctly denied Great Lakes' motion for a judgment as a matter of law.

In *Foulk*, 144 F.3d at 258, the substantiality of the nature of the work performed (diving), even when combined with the shortness of the duration (accident on the first day of a ten-day hitch), still permitted the Third Circuit to reverse a summary judgment denying seaman status because:

> The durational element cannot be answered by an absolute measure. It is the temporal element and the nature of the activities performed that, taken together, determine seaman status. *Chandris*, 115 S.Ct. at 2190-91. While the Supreme Court did adopt "the centerpiece of the formulation used by the Court of Appeals" in that case (the two-part test), and did find it "important that a seaman's connection to a vessel. . . be substantial in both respects (duration and nature)," *Id.* at 2191, the Court specifically rejected "the temptation to create detailed tests to effectuate the congressional purpose, tests that tend to become ends in and of themselves." *Id.* at 2190. To define substantial duration by an absolute number would be to create such a test. The ultimate inquiry is "whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time," *Id.* at 2191, and the two-part test is merely an aid in making that determination.

Plaintiff-Delange was a union carpenter working on a pile driving project constructing an offshore navigational aid. Although the barge was moved only four times in his five month duty, an adverse summary judgment was reversed because a jury could find his varied duties and the duration of his employment made him a seaman, *Delange v. Dutra Construction Co., Inc.*, 183 F.3d at 916, 920.

Because, "Under Ninth Circuit precedent, a worker's duties take him to sea if they are 'inherently vessel related' or 'primarily sea-based activities,'" the decision of the Benefits Review Board finding Gerald Lorimer to be a seaman as the deckhand of a dredge was affirmed. *Lorimer*, 2002 U.S. App. LEXIS 10775, *4.

The Third and the Ninth Circuits have correctly construed and applied this Court's test. The failure of the Court of Appeals to do so in this case establishes a conflicting and contrary precedent.

D. Alternatively, the Summary Judgment Rendered by the Court of Appeals Was Erroneous

Although "seaman" is a statutory term, the interpretation of which is a question of law, "the inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel and the employee's precise relation to it." *Wilander*, 111 S.Ct. at 817. Consequently, this Court has held that "seaman status under the Jones Act is a question of fact for the jury." *Wilander*, 111 S.Ct. at 817. This holding was reinforced in *Chandris*, wherein this Court stated that "questions of seaman status under Jones Act is normally for the fact finder to decide." *Chandris*, 115 S.Ct. at 2172. The District Court, who was the ultimate trier of fact, had already so found. Certainly, this was a reasonable conclusion, and it should have been affirmed.

Nunez, arguably a seaman, and as such, considered a ward of the Court, is in the unusual posture of having never had an opportunity to present evidence to the trier of fact on seaman status. Given the fact that summary judgment on the issue of seaman status was granted in Nunez's favor before trial and the matter reversed and not remanded for an evidentiary hearing on appeal, Nunez has been denied an opportunity to present the evidence regarding seaman status to the trier of fact, despite the substantial evidence in the record that would militate in favor of a finding of seaman status. The evidence adduced for the District Court regarding seaman status could not reasonably be considered

uncontroverted in defendant's favor if the facts were viewed in the light most favorable to Nunez. Even if the Court determines that the original summary judgment that Nunez was granted on the issue of seamen status was inappropriate, at a minimum, the proper remedy would have been a remand for an evidentiary hearing by the trier of fact on that issue.

Moreover, this Court has not approved summary judgments that rest on credibility determinations. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Thus, it was procedurally inappropriate for the Court of Appeals to render summary judgment in this case.

CONCLUSION

As did the District Court in denying Clarendon's motion for summary judgment,[16] it, as the trier of fact, could reasonably have found:

> Clarendon does not dispute that B&B's barges are vessels in navigation, that Nunez was a member of the six-man crew employed by B&B at the three locations where dredging took place, and that Nunez's duties contributed to accomplishing the function of the vessel in dredging silt from waterways. Further, for two years, Nunez played an integral part in connecting and maintaining the pipeline through which the dredged material was delivered to the shore. His duties in the service of the dredge required him to work on the waterway between the dredge and the dump site and exposed him to the perils of the sea. Contrary to Clarendon's arguments, the questions concerning the percentage of time spent on the dredge, the meal arrangements, and sleeping accommodations are not determinative of seaman status. Additionally, the site of a

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[16] App. E, 41a.

seaman's injury does not bar him from his Jones Act seaman status.

Given the facts of this case, this was both a permissible and a correct conclusion and certainly not a "bizarre result." The contrary result reached by the Court of Appeals deviates from the established jurisprudence of this Court and creates a conflict among the Circuits that should be resolved by this Court. This Court should grant certiorari, reverse the Fifth Circuit, reinstate the final judgment of the District Court, and remand this case to the Court of Appeals for resolution of the issue of whether or not the District Court was in error in reducing the judgment by fifty percent on account of the settlement with another defendant.

Alternatively, this Court should grant certiorari, reverse the Fifth Circuit and remand the case to the District Court for an evidentiary hearing by the trier of fact on the issue of seaman status.

For all these reasons, Petitioner requests that this Court grant his Petition for Certiorari.

Respectfully submitted,



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APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED APRIL 22, 2002

MILFRED J. NUNEZ Plaintiff - Appellee - Cross-Appellant
VERSUS B & B DREDGING, INC. ET AL, Defendants;
CLARENDON AMERICA INSURANCE COMPANY,
Defendant - Appellant - Cross-Appellee
No. 00-30993
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
288 F.3d 271; 2002 U.S. App. LEXIS 7410
April 23, 2002, Decided

SUBSEQUENT HISTORY: [**1] Rehearing Denied May 21, 2002, Reported at: 2002 U.S. App. LEXIS 10979.

PRIOR HISTORY: Appeals from the United States District Court For the Eastern District of Louisiana, New Orleans. 98-CV-2572-S. Mary Ann Vial Lemmon, US District Judge., Nunez v. B & B Dredging, Inc., 108 F. Supp. 2d 656 (E.D. La. 2000).

DISPOSITION: Reversed and rendered.

[*273] W. EUGENE DAVIS, Circuit Judge:

The question in this case is whether a land-based employee who is permanently assigned to work in the service of a vessel but who spends only 10% of his time working aboard the vessel may enjoy seaman status. We hold that such an employee is not a seaman.

I.

Milfred J. Nunez was employed by B&B Dredging, Inc. (B&B) for two years. During [*274] the last 18 months of his employment, his work was in relation to the M/V DREDGE BATON ROUGE. He first worked on the construction of the M/V DREDGE BATON ROUGE in the shipyard. After she was commissioned and began dredging work, he followed the dredge as dredge dump foreman. In this role, Nunez oversaw the discharge of dredge soil on or near the bank of the waterway in

which the dredge was operating. This included building, monitoring, and changing dredge spoil sites, where the dredge empties silt into piles on the shore. Although he traveled across water to the dredge twice a day to report to his supervisor and occasionally ate meals onboard, [**2] it is uncontested that Nunez performed 90% of his work on land.

On September 4, 1997, the M/V BATON ROUGE had been engaged for about three months in dredging a section of the Florida Intercoastal Waterway for the U.S. Army Corps of Engineers. While performing his duties on that date as dump foreman, Nunez began to sink into the silt. In order to escape, he climbed onto the back of a track hoe, but when he attempted to walk across the left track, the housing of the track hoe rotated, causing the body of the machine to hit Nunez's left shoulder and throw him approximately twenty feet in the air. Nunez suffered serious injuries as a result.

Nunez sued B&B and its insurer, Clarendon America Insurance Company (Clarendon), asserting claims for negligence under the Jones Act, n1 and unseaworthiness, maintenance, and cure under general maritime law. n2 B&B and Clarendon moved for summary judgment, arguing that Nunez was not a seaman under the Jones Act, which the court denied. Then Nunez moved for summary judgment on the same issue; the court granted the motion, holding that Nunez was a seaman as a matter of law. After a trial, the court awarded Nunez damages and entered final judgment. [**3] B&B and Clarendon then lodged this appeal.

- -Footnotes- -

n1 46 U.S.C. §§ 688 et seq.

n2 Nunez also sued the owner, operator, and insurer of the track hoe. The owner settled with Nunez before trial. After trial, the district court held that the operator of the track hoe had not abandoned his relationship with the hoe's owner and had worked

in furtherance of the business of both the owner and B&B. Thus, the court held both companies jointly liable for his negligence, and since the owner had already settled for its half, it reduced Nunez's damage award by half. Nunez cross-appeals this reduction. Our holding on the issue of seaman status renders this cross-appeal irrelevant.

- -EndFootnotes- -

II.

B&B argues that the district court erred by finding that Nunez was a seaman as a matter of law. We agree with B&B for the reasons that follow.

A.

Over 40 years ago this Circuit in *Offshore Company v. Robison* established a test for seaman status. n3 We stated that: there is an evidentiary basis for a Jones[**4] Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in [*275] terms of its maintenance during its movement or during anchorage for its future trips. n4

- -Footnotes- -

n3 *Robison*, 266 F.2d 769, 779 (5th Circ. 1959).

n4 *Id.* at 779. See also *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437, 439 (5th Cir. 1991) (noting that the Supreme Court endorsed the Robison test in *McDermott Int'l., Inc. v. Wilander*, 498 U.S. 337, 354-55, 111 S. Ct. 807, 817 (1991)).

- -EndFootnotes- -

The Supreme Court in a series [**5] of cases beginning in

1991 essentially accepted this Circuit's seaman status test. n5 In *Chandris v. Latsis*, n6 the Court established a two-part test to determine seaman status that essentially tracked this Circuit's test in *Robison* and this Court's 1986 en banc opinion in *Barrett v. Chevron*. n7

- -Footnotes- -

n5 See *Wilander; Chandris, Inc. v. Latsis*, 515 U.S. 347, 368, 115 S. Ct. 2172, 2190 (1995); and *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 554, 117 S. Ct. 1535, 1540 (1997).

n6 *Chandris*, 515 U.S. 347, 115 S. Ct. 2172, 132 L. Ed. 2d 314 (1995).

n7 *Barrett*, 781 F.2d 1067 (5th Cir. 1067) (en banc).

- -EndFootnotes- -

The Supreme Court stated the test as follows:

First . . . an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission . . . Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to **[**6]** an identifiable group of such vessels) that is substantial in terms of both its duration and its nature. n8

- -Footnotes- -

n8 *Hufnagel v. Omega Service Industries, Inc.*, 182 F.3d 340, 346 (5th Cir. 1999), quoting *Harbor Tug*, 520 U.S. at 554, 117 S. Ct. at 1540 (1997) (quoting *Chandris*, 515 U.S. at 368, 115 S. Ct. at 2190 (1995)) (citations and internal quotation marks omitted).

- -EndFootnotes- -

It is uncontested that Nunez's job as dump foreman contributed to the function and mission of the vessel. An essential function of a dredge is to remove soil and silt from the seabed of the waterway where the dredge is working. That spoil must be disposed of in an orderly fashion on the shore for the

dredge to perform its function. Because Nunez was performing this essential job that allowed the dredge to perform her work, the first prong of the Supreme Court's seaman status test is satisfied. We therefore [**7] turn our attention to the second prong: whether Nunez's connection to the dredge BATON ROUGE was substantial in terms of both it duration and its nature.

B.

We are satisfied that the Supreme Court's analysis in *Chandris v. Latsis* resolves this question. In *Chandris*, plaintiff Latsis sued his employer and sought recovery as a seaman under the Jones Act. Latsis was a salaried engineer responsible for maintaining and updating the electronic and communications equipment on Chandris' fleet of six passenger ships. He planned and directed ship maintenance from shore and was also required to take voyages on the ships in the fleet to perform his job. He also spent some time supervising the vessels' refurbishment in the shipyard.

The Court clarified what "employment related connection to a vessel in navigation" is necessary for a maritime worker to qualify as a seaman under the Jones Act.

The Court first discussed the fundamental purpose of the requirement that a seaman have a substantial connection to his vessel:

. . . Most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial[**8] [*276] in terms of both its duration and its nature. The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to

the perils of the sea. This requirement therefore determines which maritime employees in *Wilander's* broad category of persons eligible for seaman status because they are "doing the ship's work," are in fact entitled to the benefits conferred upon seamen by the Jones Act because they have the requisite employment-related connection to a vessel in navigation. n9

- -Footnotes- -

n9 *Chandris*, 515 U.S. at 368-69, 115 S. Ct. at 2190 (internal citation omitted).

- -EndFootnotes- -

The Court emphasized that the worker's connection to the vessel must be substantial in both its duration and nature. The Court explained: [**9]

> The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time. n10

- -Footnotes- -

n10 Id. at 370, 115 S. Ct. at 2190-91.

- -EndFootnotes- -

The Court disagreed with the Court of Appeals that the seaman's connection to a vessel had no temporal requirement. The Court stated "a maritime worker who spends only a small fraction of his working time onboard a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are." n11 The Court stated further that "generally, the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: a worker who spends less than about 30% of his time in the service of a vessel

in navigation should not qualify as a seaman under the Jones Act." n12

- -Footnotes- -

n11 *Id.* at 371, 115 S. Ct. at 2191.

n12 *Id.*

- -EndFootnotes- -

Nunez points to the Robison test authorizing a finding that the employee has the requisite connection to a vessel if he was: . . . "assigned permanently to a vessel. . ." or . . ."performed a substantial part of his work on the vessel." He argues that this test is disjunctive and because he was permanently assigned to the dredge BATON ROUGE as the dump foreman the district court correctly found that he had the requisite connection to a vessel. We disagree. This interpretation ignores the Supreme Court's teaching in Chandris that a seaman's connection with a vessel includes a temporal requirement, i.e. that the worker spend a substantial part of his work time aboard the vessel. Were we to accept Nunez's argument, we would remove this requirement. In other words, Nunez would have us adopt a rule -- contrary to *Chandris's* directions -- that any worker whose duties contribute to the function or the mission of the vessel is a seaman without regard to whether that worker ever sets foot on the vessel. Such an interpretation would introduce a host of land-based employees as potential [**11] Jones Act seamen simply because their work supports the vessel's mission.

In *Palmer v. Fayard Moving and Transp. Corp.*, a land-based employee such as Nunez sought recovery under the Jones [*277] Act. n13 Ms. Palmer, the plaintiff in that case, was a land-based public relations officer whose job was entirely devoted to promoting a single vessel, the M/V FRANCIS FAYARD. Ms. Palmer's duties included writing letters promoting the use of the vessel, acting as liaison with clients, researching the history of the ship, and setting up trips on the vessel. She spent approximately 19% of her working hours

aboard the ship preparing the social areas of the ship and cleaning it before and after social events. Despite the fact that Palmer -- like Nunez -- spent 100% of her time furthering the mission or function of the vessel, we concluded that she was not eligible for seaman status because the time she spent aboard the vessel was insubstantial.

- -Footnotes- -

n13 *Palmer*, 930 F.2d 437 (5th Cir. 1991).

- -EndFootnotes- -

If we were to accept[**12] Nunez's argument, we would expand the ranks of potential Jones Act seamen to all land-based employees who further the mission or function of the vessel, from salesmen to payroll clerks to corporate executives. Neither the law of the Supreme Court or of this Circuit will permit such a bizarre result.

III.

For a worker such as Nunez who divides his work time between the shore and the vessel, he must demonstrate that he spends a substantial part of his work time aboard the vessel in order to demonstrate that he has the requisite connection to a vessel in order to qualify for seaman status. Nunez spent approximately 10% of his work time aboard the dredge BATON ROUGE. Because this is an insubstantial part of his work time, he does not qualify for seaman status. Because Nunez is not a seaman as a matter of law, we reverse the judgment of the district court and render judgment in favor of B&B.

REVERSED AND RENDERED

APPENDIX B – OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED AND FILED ON MAY 21, 2002

MILFRED J NUNEZ Plaintiff - Appellee-Cross-Appellant v. B&B DREDGING INC; ET AL Defendants CLARENDON AMERICA INSURANCE COMPANY Defendant -Appellant-Cross-Appellee

No. 00-30993

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2002 U.S. App. LEXIS 10979

May 21, 2002, Filed

PRIOR HISTORY: [*1]

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans. *Nunez v. B & B Dredging*, 288 F.3d 271, 2002 U.S. App. LEXIS 7410 (5th Cir. La. 2002).

DISPOSITION: Petition for rehearing denied.

JUDGES: Before GARWOOD, JOLLY, and DAVIS, Circuit Judges.

OPINION: ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

W. Eugene Davis

United States Circuit Judge

APPENDIX C – OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, DATED JULY 20, 2000 AND ENTERED ON JULY 21, 2000 GRANTING FINAL JUDGMENT IN FAVOR OF MILFRED J. NUNEZ

CHARLOTTE NUNEZ, WIFE OF AND MILFRED J. NUNEZ VERSUS B&B DREDGING, INC., CLARENDON AMERICA INSURANCE COMPANY, A&A TOWING, L.L.C., ARTHUR PRESTENBACH, SR., AND CREDIT GENERAL INSURANCE COMPANY

CIVIL ACTION NO: 98-2572 SECTION: "S" (1)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

108 F. Supp. 2d 656; 2000 U.S. Dist. LEXIS 16530

July 20, 2000, Decided

July 20, 2000, Filed; July 21, 2000, Entered

DISPOSITION: **[**1]** Judgment entered in favor of Milfred J. Nunez. B&B entitled to a credit of 50%.

OPINION: **[*658]** FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND

The United States Corps of Engineers engaged B&B Dredging, Inc. (B&B) and the M/V DREDGE BATON ROUGE to dredge a waterway along the Intracoastal Canal near Panama City, Florida. The contract between B&B and the Corps required B&B to sweep silt from the Intracoastal waterway and to place it in a spoil area on a nearby island. Milfred J. Nunez was employed by B&B as a seaman n1 and a member of the crew of the M/V DREDGE BATON ROUGE. Nunez was the foreman assigned to the dredge dump and was responsible for monitoring the dredge spoil site where **[**2]** silt expelled by the dredge was

piled.

- -Footnotes- -

n1 The court has previously determined that Nunez was a seaman, in the course and scope of his employment with B&B, at the time of his injury.

- -EndFootnotes- -

B&B entered into a contract with A&A Towing, L.L.C. to furnish a track hoe and an operator to B&B. A&A leased a track hoe from Beard Equipment Rental; and Arthur Prestenbach, Jr., the president of A&A, sent his father, Arthur Prestenbach, Sr., to operate the leased track hoe. The track hoe, which was positioned on land, was used to lift and transfer pipe to the banks of the waterway.

On September 4, 1997, Nunez was injured when the track hoe struck him on his left shoulder. Nunez filed a complaint against B&B Dredging, Inc. and Clarendon America Insurance Company, B&B's insurer, asserting claims for negligence under the Jones Act, 46 U.S.C. § 688 et seq., and unseaworthiness and maintenance and cure under the general maritime law, and against A&A Towing, L.L.C., Arthur Prestenbach, Sr., and Credit General [**3] Insurance Company, A&A's insurer, asserting claims based on Prestenbach, Sr.'s negligence. n2 A&A settled before trial for $92,500. The case against B&B; Clarendon; and Prestenbach, Sr. n3 proceeded to trial without a jury. The following constitutes the court's findings of fact and conclusions of law.

- -Footnotes- -

n2 Charlotte Nunez filed a claim for loss of consortium, but abandoned the claim against B&B at the trial because the Jones Act does not recognize a claim for loss of consortium.

n3 The claims are against Prestenbach, Sr. personally and to the extent that he is a borrowed employee of B&B.

- -EndFootnotes- -

II. DISCUSSION

A. Borrowed employee

Nunez contends that B&B is liable for his injuries under a theory of respondeat superior because the injuries were caused by the negligence of B&B's borrowed employee, Prestenbach, Sr. Before addressing the allegation of negligence, the court must determine the preliminary question whether Prestenbach, Sr. is the borrowed employee of B&B.

The following evidence was presented [**4] at trial. Roland Nunez, n4 the supervisor for B&B, testified that it was his responsibility to bid and to run every aspect of the B&B jobs. The contract between A&A and B&B provided for the lease of one John Deere Excavator with a 2 1/4 yard bucket and an operator to move pipe and to raise the levees in order to keep the water from overflowing and going back into the canal. Roland stated that, although he had qualified people to operate the track hoe, Prestenbach, Sr. "came with the machine." The cost of the track hoe with an operator was $950 per day for a term of two months. A&A billed B&B the lump sum and paid Prestenbach, Sr. for the hours that he worked.

- -Footnotes- -

n4 Roland Nunez is Milford Nunez's brother.

- - -End Footnotes- -

The allegation that Roland directed where Prestenbach, Sr. would work, what [*659] work he was to perform, and how it was to be performed was supported by the testimony of Brian Guillot, a deck hand who worked in the excavated pits, who stated that Prestenbach, Sr. received his orders concerning the operation of the [**5] excavator from B&B. Prestenbach, Sr. ate with the crew, stayed with the crew at a local hotel, and traveled with the crew to the job site; he was expected to remain until the job ended.

A&A never had a supervisor on the job. Prestenbach, Jr.

stated in his corporate deposition that A&A worked as directed by B&B and that he spoke with Prestenbach, Sr. only once or twice during the two-week period that he was on the job. n5

- -Footnotes- -

n5 The parties stipulated to the admission of Prestenbach, Jr.'s testimony in the corporate deposition.

- -EndFootnotes- -

Prestenbach, Sr. spoke to his son about the accident approximately one week after it happened. Prestenbach, Jr. did not prepare an accident report because, according to his testimony, he did not consider his father to be an employee of A&A. Prestenbach, Jr.'s only visit to the job site was to inquire why Prestenbach, Sr. had been fired. After Prestenbach, Sr. was terminated, employees of B&B operated the leased track hoe.

"[A] third person who borrows a worker may become his employer if [**6] the borrowing employer assumes enough control over the worker." *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 452 (5th Cir. 1980). The borrowed employee doctrine recognizes that

one may be in the general service of another and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation.

Standard Oil Co. v. Anderson, 212 U.S. 215, 29 S. Ct. 252, 253, 53 L. Ed. 480 (1909).

In *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), the Court of Appeals enunciated nine factors to determine whether the borrowed employee doctrine applies:

(1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?

(2) Whose work is being performed?

(3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?

(4) Did the employee acquiesce in the new work situation?
(5) Did the original employer terminate his relationship with the [**7] employee?
(6) Who furnished tools and place for performance?
(7) Was the new employment over a considerable length of time?
(8) Who had the right to discharge the employee?
(9) Who had the obligation to pay the employee?
Capps v. N.L. Baroid-NL Indus., Inc., 784 F.2d 615, 616-17 (5th Cir. 1986) (citing *Ruiz*, 413 F.2d at 312-13). The courts place the most emphasis on the first factor, control over the employee; however, no single factor or combination is determinative. See *Ruiz*, 413 F.2d at 312. n6

- -Footnotes- -

n6 In *Gaudet v. Exxon Corp.*, 562 F.2d 351, 356 (5th Cir. 1977), the court de-emphasized the control factor and stressed the fourth, fifth, sixth, and seventh factors as being more important when the doctrine is used as a defense to tort liability in the context of a Longshore and Harbor Workers' Compensation Act case. See *Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1245 n.12 (5th Cir. 1988). The court conceded that the control factor was the most important factor in the use of the borrowed employee doctrine in respondeat superior cases. Id.

- -EndFootnotes- - [**8]

Under the first and second *Ruiz* factors, B&B clearly had control over Prestenbach, Sr. in performing his work for B&B. A&A gave no instructions except to [*660] send Prestenbach, Sr. to B&B's job site to operate the track hoe. Prestenbach, Sr. performed the work at B&B's work site for the benefit of B&B in fulfilling its contract with the Corps of Engineers. B&B directed all aspects of the project and employed its own safety policies.

Moreover, during the period that Prestenbach, Sr. operated the track hoe for B&B, B&B made his hotel arrangements and transported him to and from the job site.

Although the contract between A&A and B&B does not specifically provide under whose control Prestenbach, Sr. was working, the evidence indicates that it was understood by A&A that Prestenbach, Sr. would be taking his instructions from Roland and B&B, in satisfaction of the third factor. Prestenbach, Sr. understood that A&A was in the business of leasing equipment and, at times, providing an operator for the equipment. Further, Prestenbach, Sr. agreed to work for B&B under its direction, indicating his acquiescence in the arrangement, as required by the fourth factor.

The fifth factor focuses on [**9] the lending employer's relationship with the employee during the time of the borrowing. Although there is no evidence that A&A intended permanently to terminate its relationship with Prestenbach, Sr., no one from A&A visited the job site during the time of borrowing, and Prestenbach, Sr. and Prestenbach, Jr. spoke only a few times. The fifth factor favors a finding of borrowed employee status. See *Capps*, 784 F.2d at 617.

The equipment was leased by A&A from Beard and furnished to B&B at B&B's job site. The sixth factor appears to be neutral.

The three remaining factors weigh in favor of borrowed employee status. Although the lease agreement with A&A was for a relatively short term of two months, it was expected that Prestenbach, Sr. would be employed to operate the track hoe for the duration of the contract with the Corps of Engineers. Prestenbach, Sr.'s term was interrupted when B&B exercised its right to terminate his services at its project. This factor weighs in favor of borrowed employee status. *See Brown v. Union Oil Co. of California*, 984 F.2d 674, 678 (5th Cir. 1993) (one month is a sufficiently long work period). B&B had the right to fire [**10]

Prestenbach, Sr. The captain of the dredge did in fact fire him when the dredge was shut down because Prestenbach, Sr. was unable to perform his work of keeping up the levees satisfactorily. B&B's right to terminate Prestenbach, Sr.'s services on this job satisfies the eighth factor, even though it could not terminate his services with A&A. *See Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1246 (5th Cir. 1988). The ninth factor weighs in favor of borrowed employee status, even though A&A wrote the check. *See Capps*, 784 F.2d at 618. B&B was obligated under the contract to pay Prestenbach, Sr.'s wages at a rate of $175 per day.

Accordingly, the court concludes that the Ruiz factors weigh in favor of the determination that Prestenbach, Sr. was the borrowed employee of B&B. The analysis now turns to the questions whether Nunez was injured as a result of Prestenbach, Sr.'s negligence.

B. The liability of Prestenbach, Sr.

Nunez asserts that he was injured when Prestenbach, Sr. rotated the housing of the track hoe and knocked him 15 to 20 feet into the air. He alleges that his injuries were the result of Prestenbach, Sr.'s negligence. [**11]

On the morning of the accident, Nunez was at the dumpsite instructing Guillot to add a pipe connection to prevent the silt from going back into the waterway. Nunez testified that he tried to reach Guillot to assist him, but he started sinking in the mud as he moved toward Guillot. Nunez then climbed on the track hoe and advised Prestenbach, Sr. not to move the rig while he was attempting to walk to the other [*661] side. Nunez recalls that Prestenbach, Sr. acknowledged and said "okay." As Nunez climbed across the back to the left track, the housing of the track hoe rotated. Nunez stated that he did not know why Prestenbach, Sr. moved the machine. n7

- -Footnotes- -

n7 Prestenbach, Sr. did not appear to testify at trial. On the morning of the trial, the court issued a warrant instructing the United States Marshal to locate Prestenbach, Sr. and to deliver him to the courtroom to testify. The marshals were unable to locate him, and the warrant was rescinded at the close of the evidence at the request of counsel for both parties.

- -EndFootnotes- -

Guillot [**12] testified that he saw Nunez speak to Prestenbach, Sr. and watched as the crane swung around and sent Nunez "flying." Guillot stated that Nunez did not signal Prestenbach, Sr. to move the machine and that he did not know why the operator did so.

Guillot agreed that Nunez was hit on his left shoulder and was thrown approximately 15 to 20 feet in the air. Nunez landed on his left side in the silt near Guillot's feet. Guillot tried to help Nunez up, but he did not want to hurt him. Guillot noticed that Nunez's right arm was "giving him trouble."

Roland learned about Nunez's accident when he returned to the hotel in the evening. He affirmed that B&B's safety manager interviewed Guillot and the operator and prepared an accident report. Roland stated that the company rule that the operator could not move the machine while a pipeline was being moved unless directed to do so had been explained to Prestenbach, Sr. at safety meetings.

The evidence supports a finding that Prestenbach, Sr. was negligent in the operation of the track hoe and that Nunez was injured as a result of that negligence. The operator was advised of the safety procedures and was informed that he was to take his instructions [**13] from Nunez before moving the track hoe. Although Nunez warned that he was about to make the maneuver and Prestenbach, Sr. acknowledged that he understood, Prestenbach, Sr. caused the housing to move and to strike Nunez, injuring him.

Under the Jones Act, a seaman is obligated "to act with ordinary prudence under the circumstances." *See Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997) (en banc). "The circumstances of a seaman's employment include not only his reliance on his employer to provide a safe work environment but also his own experience, training, or education. The reasonable person standard, therefore, [in] a Jones Act negligence action becomes one of the reasonable seaman in like circumstances." Id.

The court finds that Nunez acted with ordinary prudence under the circumstances. Nunez advised Prestenbach, Sr. that he was going to climb across the back of the track hoe, and there was no evidence that Nunez was negligent in executing the maneuver.

C. B&B's liability

Moreover, the court finds that B&B is liable for Prestenbach, Sr.'s negligence. The borrowed employee doctrine holds the "proper employer responsible for **[**14]** the torts of his employee" under the theory of respondeat superior. *Gaudet v. Exxon Corp.*, 562 F.2d 351, 355 (5th Cir 1977). Because Prestenbach, Sr. is B&B's borrowed employee, B&B is responsible for Prestenbach Sr.'s negligence under the theory of respondeat superior.

D. A&A's liability

Although A&A entered into a settlement agreement with Nunez prior to trial, the court is not relieved of the task of determining whether A&A was legally responsible for Nunez's injuries because B&B may be entitled to a credit for the proportionate liability of the settling defendant. n8 The court considers whether A&A **[*662]** maintained sufficient control over the borrowed employee to lead to the conclusion that he was also A&A's employee. *See Tyson v. Litwin Corp.*, 826 F.2d

1255, 1258 (3rd Cir. 1987).

- -Footnotes- -

n8 Where the defendants are both vicariously liable for the same act of their joint employee under the doctrine of respondeat superior, they are each liable for 50%. *See United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708, 1716, 44 L. Ed. 2d 251 (1975) (liability "is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault"); *see McDermott, Inc v. AmClyde.*, 511 U.S. 202, 114 S. Ct. 1461, 1465, 128 L. Ed. 2d 148 (1994); see, *e.g, Thompson v. New Orleans Public Belt R.R.*, 373 So. 2d 1312, 1318 (La. Ct. App. 1979) (when damages are apportioned between two employers, each should be responsible for its virile share; apportioning 50% fault to each employer).

- -EndFootnotes- - [**15]

The court looks to section 227 of the Restatement (Second) of Agency (1958) for guidance. n9 Comments b and c of § 227 address the method used to determine whether Prestenbach, Sr. understood that he remained in the allegiance of A&A when he was operating the track hoe.

b. Inference that original service continues. In the absence of evidence to the contrary, there is an inference that the actor remains in his general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer. There is no inference that because the general employer has permitted a division of control, he has surrendered it.

c. Factors to be considered. Many of the factors . . . which determine that a person is a servant are also useful in determining whether the lent servant has become the servant of the borrowing employer. Thus a continuation of the general employment is indicated by the fact that the general employer can properly substitute another servant at any time,

that the time of the new employment is short, and that the lent servant has the skill of a specialist.

A continuance of the general employment is also indicated in the [**16] operation of a machine where the general employer rents the machine and a servant to operate it, particularly if the instrumentality is of considerable value. Normally, the general employer expects the employee to protect his interests in the use of the instrumentality, and these may be opposed to the interests of the temporary employer. If the servant is expected only to give results called for by the temporary employer and to use the instrumentality as the servant would expect his general employer would desire, the original service continues. Upon this question, the fact that the general employer is in the business of renting machines and men is relevant, since in such case there is more likely to be an intent to retain control over the instrumentality. A person who is not in such business and who, gratuitously or not, as a matter not within his general business enterprise, permits his servant and instrumentality to assist another, is more apt to intend to surrender control.

- -Footnotes- -

n9 Section 227 sets forth the borrowed servant doctrine:
A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other's servant as to some acts and not as to others.

- -EndFootnotes- - [**17]

In this case, the evidence does not contradict the inference that Prestenbach Sr.'s original service with A&A continued. A&A was in the business of renting machines and providing an operator for those machines. Prestenbach, Sr. had a special relationship with A&A because he is the father of the owner of A&A. A&A provided the operator and implicitly retained the

capacity under the contract to substitute another operator for Prestenbach, Sr. at any time. Further, B&B had the right to direct Prestenbach, Sr. in the specific acts of the job and to discharge him from B&B's employment; however, B&B could not discharge him from A&A's [*663] employment. n10 Accordingly, the court finds that Prestenbach, Sr. did not abandon his relationship with A&A, worked in furtherance of the business of both A&A and B&B, and he was the employee of both B&B and A&A. n11

- -Footnotes- -

n10 The court does not find it important that A&A leased the track hoe from another vender because A&A assumed responsibility for the track hoe.

n11 The rule in several jurisdictions is that both the general and special employer may be held liable for the employee's tort. *See Morgan v. ABC Manufacturer*, 710 So. 2d 1077, 1082 (La. 1998); *see also LeJeune v. Allstate Ins. Co.*, 365 So. 2d 471, 482 n.14 (La. 1978) (listing jurisdictions that have held that the general and special employer may be held solidarily liable for the employee's tort), *Bright v. Cargill, Inc.*, 251 Kan. 387, 837 P.2d 348, 362-63 (Kan. 1992); Restatement (Second) of Agency § 227 notes (court citations July 1992 through June 1999).

- -EndFootnotes- - [**18]

In Jones Act and general maritime cases, joint tortfeasors are jointly and severally liable. *See Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1116 (5th Cir. 1995) (en banc); *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908, 915 (1st Cir. 1987). A Jones Act defendant can be held jointly liable with a defendant whose negligence arises under state or general maritime law. *See Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1431 (5th Cir. 1988). Accordingly, A&A, B&B, and Prestenbach, Sr. are jointly and severally liable.

In cases such as this in which there has been a settlement, the nonsettling defendant is entitled to a credit for that settlement.

See McDermott, Inc. v. AmClyde, 511 U.S. 202, 114 S. Ct. 1461, 1465, 128 L. Ed. 2d 148 (1994). The credit to the nonsettling defendant is determined by the proportionate share of liability of each defendant. 114 S. Ct. at 1470-72. Because A&A and B&B are both vicariously liable as employers of Prestenbach, Sr., B&B is credited with A&A's 50% share of liability. n12

- -Footnotes- -

n12 The parties do not raise the issue whether A&A and B&B could seek indemnity or contribution from Prestenbach, Sr.

- -EndFootnotes- - [**19]

E. The extent of the injury caused by the accident

Nunez was treated at a clinic n13 in DeFuniak Springs, Florida, the day following the accident, where the clinic physician gave him a sling for his left arm and sent him back to work on light duty. Nunez could not return to his position as dump foreman, and Roland placed him on light duty transporting the crew to and from the job and checking the site. Nunez was never able to return to regular duty. He accompanied the crew to another job in the Mississippi River above Baton Rouge and operated a survey boat or transported materials until his employment with B&B terminated in February 1998.

- -Footnotes- -

n13 The clinic has since closed, and Nunez has been unable to obtain his medical records.

- -EndFootnotes- -

Nunez then went to work at Gulf South Marble driving a delivery truck. The people at the various delivery sites unloaded the truck for him because he was unable to lift the boxes of tile. Following the advice of his physician, Nunez quit the job after two months because it was [**20] too strenuous.

On March 16, 1998, when Nunez began dropping items that he was holding, he saw Dr. Essam Elmorshiddy, n14 an

orthopaedist, for an evaluation. The medical records indicate that Nunez was complaining of pain in his neck and pain referred to his left shoulder and left elbow as a result of being hit on his left side by the back of a swinging track hoe six months earlier. Nunez told Dr. Elmorshiddy that he initially thought his neck and shoulder pain would improve with time, but that it had not. Nunez did not have a history of neck, shoulder, or elbow problems prior to the accident.

- -Footnotes- -

n14 Dr. Elmorshiddy did not testify because he was killed in an automobile accident in November 1998.

- -EndFootnotes- -

The examination of Nunez's neck showed spasms, tenderness, and limited [*664] motion. The elbow showed tenderness, weakness of the grip of the left hand, and diminished sensation of the thumb, index, and middle finger. Dr. Elmorshiddy diagnosed a strain of the cervical spine, aggravation of degenerative arthritis, contusion of [**21] the right shoulder, post-traumatic subacromial busitis, and post-traumatic tendinitis of extensor origin of the left elbow.

The doctor ordered a MRI of the cervical spine and an EMG. A MRI of the cervical spine showed disc herniation at C6-7 producing significant encroachment on the canal and cervical cord and significant encroachment upon the dural sac at C5-6. The EMG showed left median neuropathy at the left wrist. Dr. Elmorshiddy chose a conservative treatment of massage, heat, and medication. The tender areas of the neck and shoulder were injected with a local steroid and xylocaine, and Nunez was given a brace for his wrist. Dr. Elmorshiddy discussed the feasibility of surgery and immobilized Nunez in a "Miami J" cervical collar.

On July 2, 1998, Nunez's symptoms persisted, and he began experiencing stiffness and pain in the back and in the right hip and leg. An examination of the back showed muscle spasms, tenderness, and limited painful motion. A MRI of the lumbar

spine showed osteophyte/disc complex causing a mild degree of central stenosis at L4-5, and a disc bulge.

On August 8, 1998, Nunez underwent surgery for left carpal tunnel syndrome. Dr. Elmorshiddy continued to [**22] treat Nunez conservatively for the pain related to his neck and back.

Because of Dr. Elmorshiddy's untimely death, on December 15, 1998, Nunez's care was assumed by Dr. George Murphy, an orthopaedist. At trial, Dr. Murphy testified that Nunez has multi-level disc disease at C5-6 and C6-7. He stated that the complaints of pain reported by Nunez correlate to the radiographic evidence and that there is nothing inconsistent with the presence of pain on the left side. There is a large herniated disc at C6-7 that contacts the spinal cord and poses a risk of developing a neurological problem if there should be further injury. According to Dr. Murphy, spinal cord compression can cause symptoms on the left or right side and could cause referred pain to Nunez's left shoulder and arm. In light of the current cord compression, Nunez may be a candidate for cervical spine surgery in the future. At C5-6 there are bony changes that predate the accident. Dr. Murphy opined that Nunez's condition was asymtomatic prior to the accident and that the trauma of the accident could have caused it to become symptomatic.

Dr. Murphy assigned a 10 to 15% whole body impairment as a result of the condition of the [**23] cervical spine and a 10 to 20% impairment rating due to the problems at the left upper extremity. He stated that, based on the injury to his neck alone, Nunez would have been restricted after the accident. Dr. Murphy did not view Nunez as a malingerer and reiterated that the objective evidence supported his complaints.

The defendant presented the testimony of Dr. Melvin Parnell, who conducted a ten-minute examination of Nunez on January 12, 1999. The examination showed cervical spine motion at

approximately 50% of normal with discomfort at the extremes of motion. Although Dr. Parnell found discomfort at the base of the neck, he stated that there was no radiation of the discomfort into either upper extremity. There was an impaired range of motion of the left shoulder, but no evidence of instability.

Dr. Parnell also reviewed copies of the MRI scans of the cervical and lumbar spine. Dr. Parnell stated that there was evidence of a disc herniation at C6-7 on the right side of the cervical spine. There was also evidence of compression of the spinal cord at C5-6 on the right side due to a bone spur. The MRI of the lumbar spine showed evidence of a bulging disc at L4-5 to the right. Based [**24] on the review of [*665] the radiographic studies, Dr. Parnell did not feel that there was evidence of a clinically significant disc herniation in either the cervical or the lumbar spine.

Dr. Parnell disagreed with the radiologist's statement that there was a significant encroachment of the cord and opined that Nunez sustained cervical and lumbar strains with no significant permanent impairment to either the neck or the lower back. He stated that muscle spasms, limitation of motion, and pain were consistent with chronic cervical strain.

The court finds the testimony of Dr. Murphy credible and credits the records and reports of Dr. Elmorshiddy and the radiologists concerning the extent of Nunez's injury. Further, the court finds that Nunez's present injury as identified by these physicians was caused by the accident involving the track hoe in September 1997. Even if Nunez's degenerative condition was present before the accident, the trauma of being struck and thrown 15 to 20 feet caused his condition to become symptomatic.

F. Vocational Expert

On December 7, 1999, Bobby Roberts, a vocational evaluation specialist, evaluated Nunez to determine his levels of vocational functioning [**25] and to predict future

employability. In addition to administering a variety of tests, Roberts reviewed radiological reports from Chalmette Medical Center and the medical reports of Dr. Elmorshiddy and Dr. Murphy.

Nunez was born on September 21, 1939, and completed the 8th grade at St. Bernard High School. His test results revealed a borderline range of classification overall with an extreme deficiency in math skills and an elevated range for situational personality factors. Nunez's overall general ability for performance characteristics was consistent with a history of semi-skilled work activities.

At the time of testing, Nunez had difficulty with sustained activities. He could sit for 15 minutes or less, he could stand for 10 minutes or less, and sustained activities caused increased symptoms in the left shoulder and left upper extremity with marked decreased capability. Roberts clarified that there were activities that Nunez could perform, such as removing his Christmas tree lights or dragging his tree to the trash; however, Nunez could perform such activities only for a short duration and could not sustain the activities over time.

Roberts testified that he had not detected signs [**26] of malingering or exaggeration and that the computerized test results did not identify any inconsistencies. Roberts disagreed with the treating physician that Nunez was only restricted to sedentary work because Nunez lacked the academic skills required to perform even sedentary work, he could not use both upper extremities in the performance of sedentary work, and he could not flex his neck forward.

Roberts recommended continued medical evaluation and treatment of the cervical symptoms; further medical evaluation of the upper extremity symptoms, which showed decreased functional ability; further medical evaluation of low back

symptoms, which extended down the left lower extremity to the ankle; a referral to a clinical psychologist to evaluate the elevated personality factors; and a referral to an ophthalmologist to evaluate his vision deficits. In view of Nunez's age, poor educational levels of functioning, and limited functional capabilities, Roberts concluded that it was unlikely that he could return to the gainful labor market. n15

- -Footnotes- -

n15 Dr. Parnell testified on cross-examination that he had not seen the results of Mr. Roberts' tests; however, the tests may have influenced his opinion if he determined that they were valid.

- -EndFootnotes- - [**27]

In lieu of testimony, the defendant presented evidence of a written report of a vocational rehabilitation evaluation conducted by Judith Lide. Lide met with Nunez [*666] on January 5, 2000; administered the Wide Range Achievement Test and the Vocational Preference Inventory; and reviewed Nunez's deposition, his social security and employment records, Roberts' vocational report, and the medical records. After considering the restrictions outlined by Dr. Elmorshiddy, Lide concluded that Nunez could perform selected assembling and packaging tasks, work as a security guard, perform small equipment repairs, and obtain certain driving positions that did not require a commercial driver's license.

After carefully considering the testimony, medical reports and records and the vocational experts' reports, the court finds that Nunez does not have the functional ability to perform gainful work activity due to his age, academic level of functioning, and limited sustained physical capabilities.

G. Damages

Nunez seeks special damages for past medical expenses, future medical expenses, past lost earnings, future lost earnings, general damages, and prejudgment interest on past losses under

the [**28] general maritime law.

IT IS ORDERED that there be judgment in favor of Milfred J. Nunez as follows:

Past medical:	$ 13,873.83
Future medical:	$ 23,814.00
Past lost earnings:	$ 69,905.00
Future lost earnings:	$ 143,977.00
General damages:	$ 100,000.00.

The court declines to award prejudgment interest on past losses because the Nunez proceeded against B&B under the Jones Act, and prejudgment interest is not an element of damages thereunder. *See Simeon v. T. Smith & Son. Inc.*, 852 F.2d 1421 (5th Cir. 1988). Because Prestenbach, Sr. was the employee of both A&A, the settling defendant, and B&B, B&B is entitled to a credit of 50%.

New Orleans, Louisiana, this 20 day of July, 2000.

MARY ANN VIAL LEMMON

UNITED STATES DISTRICT JUDGE

APPENDIX D – OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, DATED MAY 17, 2000 AND ENTERED ON MAY 18, 2000 GRANTING SUMMARY JUDGMENT IN FAVOR OF MILFRED J. NUNEZ

ORDER AND REASONS

IT IS HEREBY ORDERED that the motion for summary judgment of Charlotte Nunez and Milfred J. Nunez is GRANTED. (Document #62.)

I. BACKGROUND

Milfred J. Nunez and his wife, Charlotte Nunez, filed a complaint against the defendants[1] asserting claims for negligence under the Jones Act, 46 U.S.C. § 688 et *seq.*, and unseaworthiness and maintenance and cure under the general maritime law.[2] Nunez alleges that he was employed by B&B Dredging, Inc. (B&B) as a seaman and a member of the crew of the M/V DREDGE BATON ROUGE. On September 4, 1997, the M/V DREDGE BATON ROUGE was engaged by the United States Corps of Engineers to dredge a waterway along the Intracoastal Canal near Panama City, Florida. Nunez was a foreman assigned to the dredge dump.[3] A CAT track hoe and its operator, Arthur Prestenbach, Sr., (Prestenbach), were leased from A&A Towing, L.L.C. (A&A). Nunez alleges that he sustained serious injuries when Prestenbach rotated the housing of the track hoe and struck Nunez as he climbed aboard the track

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1. The original defendants were B&B Dredging, Inc (B&B); Clarendon America Insurance Company (Clarendon), B&B's insurer; A&A Towing, LLC; Arthur Prestenbach, Sr.; and Credit General Insurance Company, A&A's insurer. The only remaining defendants are B&B and Clarendon. However, B&B filed for bankruptcy protection and all proceedings against it are stayed.
2. Charlotte Nunez asserts a claim for loss of consortium.
3. A dump foreman monitors the dredge spoil site where silt expelled by the dredge is piled and decides when to "pipe off" or make a new pile of silt.

to extricate himself from the soft sand.

II. DISCUSSION

1. Summary Judgment Standard

Nunez filed a motion for summary judgment, asserting that he is a seaman. Summary judgment is proper when, viewing the evidence in the light most favorable to the non-movant, "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 809 (5th Cir. 1991); Fed. R. Civ. P. 56(c). If the moving party meets the initial burden of establishing that there is no genuine issue, the burden shifts to the non-moving party to produce evidence of the existence of a genuine issue for trial. Celotex Corn. v. Catrett, 106 S.Ct. 2548, 2552 (1986). The nonmovant cannot satisfy his summary judgment burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). A fact is "material" if its resolution in favor of one party might affect the outcome of the lawsuit. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2510 (1986). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. Id. If the opposing party bears the burden of proof at trial, the moving party does not have to submit evidentiary documents to properly support its motion, but need only point out the absence of evidence supporting the essential elements of the opposing party's case. Saunders v. Michelin Tire Corp., 942 F.2d 299, 301 (5th Cir. 1991).

2. Seaman status

Nunez contends that he was a crew member, permanently assigned to the vessels; his duties contributed to the function of the dredging vessels; and the nature of his connection to the vessels was substantial.

The question who is a "seaman" is a mixed question of law and fact. See McDermott Int'l, Inc. v. Wilander, 111 S.Ct. 807, 818 (1991). "When the underlying facts are established, and the rule of law is undisputed, the issue is whether the facts meet the statutory standard." Id. Seaman status depends "on the nature of the vessel and the employee's precise relation to it." Id. "If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a "member of a crew," it is a question for the jury." Id. Summary judgment is mandated when the facts and the law support only one conclusion. Id.

The key to seaman status is employment-related connection to a vessel in navigation." Id. at 817. "[A] necessary element of the connection is that a seaman perform the work of a vessel." Id. The work of a seaman need not be limited to transportation functions that aid in the vessel's navigation. See Chandris, Inc. v. Latsis, 115 S.Ct. 2172, 2181 (1995). "Whether under the Jones Act or general maritime law, seamen do not include land-based workers." Wilander, 111 S. Ct. at 814. Jones Act coverage depends on the nature of the seaman's service, his status as a member of the vessel, and his relationship to the vessel and its operation in navigable waters. Chandris, 115 S.Ct. at 2185. To qualify as a seaman, a maritime employee need not work only on board a vessel. Id at 2187. Those who obtain seaman status do not automatically lose the protection when on shore. Id. at 2185. "Thus, if the employee's regularly assigned duties require him to divide his time between vessel and land (or platform) his status as a crew member is determined in the context of his entire employment with his current employer." Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1075 (5th Cir. 1986). Based on these principles, there are two essential requirements for seaman status: 1) the employee's duties must contribute to the function of the vessel or the accomplishment of its mission, and 2) a seaman must have a substantial connection to a vessel in navigation in terms of its duration and its nature. Chandris, 115 S.Ct. at 2190.

At the time of the accident, Nunez had been employed as a crew member by B&B for approximately two years and was permanently assigned to the DREDGE BATON ROUGE.[4] The uncontroverted deposition testimony indicates that Nunez began his work with B&B as a roustabout and an operator on the rig with occasional responsibility for running the crewboat.[5] The dredge's crew consisted of two leadermen, who operate the barge; the crewboat operator; the dump foreman (the title which Nunez had at the time of the accident); and the roustabout, who assists the dump foreman.[6] During the two years that he worked for B&B, Nunez performed repair work on a small, unnamed, twelve-inch dredge for approximately two months; assisted in the construction the DREDGE BATON ROUGE for approximately 10 months and worked on dredging assignments on the Mississippi River and in Florida.[7] Nunez worked twelve hour shifts when the dredge was in operation.[8] He took vacation time when the dredge was being moved from one jobsite to another because he did not participate in transporting the vessel to the new dredge site.[9]

Nunez traveled over water to and from the DREDGE BATON ROUGE to report on the dump site's status and operated various B&B owned vessels. He occasionally ate his meals on the dredge; however, he did not sleep on the vessel

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4. Affidavit of Roland Nunez, Nunez's brother and the supervisor of the B&B crew, 1.
5. Deposition at 32-33.
6. Deposition at 39.
7. Deposition at 50-59.
8. Deposition at 47.
9. Deposition at 81.

during his employment because there were no living quarters.[10]

At the Florida location, Nunez was required to lay 10 miles of pipeline, which was carried to the site by barge and by truck as part of the project to dredge a section of the Intracoastal Waterway. The pipeline was ten miles long because it snaked around corn and cotton fields that had to be avoided.[11] His duties included operating a survey boat, operating a flat boat, operating a tugboat, fixing the pontoon line in the river between the dredge and the dump site, shifting the two swing anchors in the river to enable the vessel to move, building levees surrounding the dump sites near the edge of the river, and loading and unloading pipe from the vessel during dredging operations.[12] At least twice a day the crew and the dump foreman made the approximately hour-long trip between the vessel and the river bank.[13]

The track hoe, which was positioned on land, was used to lift the pipe in a sling and transfer it to the banks of the waterway.[14] When the dredge arrived, Nunez made pontoon confections between the pipeline and the cutter head on the dredge in order to pump out the Intracoastal Canal.[15]

Nunez worked on the Florida assignment approximately eight weeks before he was injured.[16] After the injury, he worked light duty operating a crew boat full time for the same employer until his employment was terminated.[17]

Clarendon does not dispute that B&B's barges are vessels in

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10. Deposition at 47-48, 96-97.
11. Deposition at 87.
12. Nunez affidavit at 2.
13. Nunez affidavit at 2.
14. Deposition at 83.
15. Deposition at 90.
16. Deposition at 96.
17. Deposition at 125.

navigation and that Nunez was a member of the six-man crew employed by B&B at the three locations where dredging took place. Clarendon argues that Nunez's connection to the DREDGE BATON ROUGE was not substantial because he worked 90% of his time on land. In support of its argument that Nunez is not a seaman, Clarendon relies on the holding in Loyd v. Ram Industries, Inc., 64 F.Supp.2d 1235 (S.D. Ala. 1999) that the employee in a dredging operation was not a seaman. The undisputed facts showed that Loyd worked as an onshore pipeline man and was responsible for inspecting the land-based section of the discharge pipe. He performed maintenance on the onshore booster pipe and used a bulldozer at the dump site. Id. at 1237. However, Loyd was not a member of the crew of the dredge and did not perform any work on the water-based section of the discharge pipe. Id. Loyd occasionally boarded the vessel to obtain tools and diesel fuel. The court concluded that Loyd was not exposed to the "perils of the sea" that the Jones Act was designed to protect against. Id. at 1238.

The facts in Loyd are distinguishable from this case. Unlike Loyd, Nunez was a member of the crew, he played an integral part in connecting the pipeline to the dredge, and he worked on the waterway between the dredge and the dump site. Therefore, Nunez, unlike the plaintiff in Loyd, performed work that exposed him to the perils of the sea.

Taking into account the unique nature of the vessel and the work performed, Nunez had a substantial connection to the vessel. The site of Nunez's injury and the necessity that the work of the vessel required Nunez to spend a large portion of his time on land does not bar him from his Jones Act seaman status. Accordingly, the motion for summary judgment is granted.

New Orleans, Louisiana, this 17th day of May, 2000.

MARY ANN VIAL LEMMON, U. S. DISTRICT JUDGE

APPENDIX E – OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, DATED NOVEMBER 29, 1999 AND ENTERED ON NOVEMBER 30, 1999 DENYING THE MOTION FOR SUMMARY JUDGMENT FILED BY CLARENDON AMERICAN INSURANCE COMPANY

ORDER AND REASONS

IT IS HEREBY ORDERED that Clarendon American Insurance Company's "Motion for Summary Judgment," pursuant Rule 56 of the Federal Rules of Civil Procedure, is DENIED. (Document #31.)

I. BACKGROUND

Milfred J. Nunez and his wife, Charlotte Nunez, filed a complaint against the defendants[18] asserting claims for negligence under the Jones Act, 46 U.S.C. § 688 et *seq.*, and unseaworthiness and maintenance and cure under the general maritime law.[19] Nunez alleges that he was employed by B&B Dredging, Inc. (B&B) as a seaman and a member of the crew of the M/V DREDGE BATON ROUGE. On September 4, 1997, the M/V DREDGE BATON ROUGE was engaged by the United States Corps of Engineers to dredge a waterway along the Intracoastal Canal near Panama City, Florida. Nunez was a foreman assigned to the dredge dump.[20] A

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1. The defendants are B&B Dredging, Inc; Clarendon America Insurance Company, B&B's insurer; A&A Towing, LLC; Arthur Prestenbach, Sr.; and Credit General Insurance Company, A&A's insurer.

2. Charlotte Nunez asserts a claim for loss of consortium. In a footnote, Clarendon raises the question whether Mrs. Nunez may recover for loss of consortium. See Murray v. Anthony J. Bertucci Const. Co., Inc., 958 F.2d 127, 131-32 (5th Cir 1992).

3. A dump foreman monitors the dredge spoil site where silt expelled by the dredge is piled and decides when to "pipe off" or make a new pile of silt.

CAT track hoe and its operator, Arthur Prestenbach, Sr., (Prestenbach), were leased from A&A Towing, L.L.C. (A&A). Nunez alleges that he sustained serious injuries when Prestenbach rotated the housing of the track hoe and struck Nunez as he climbed aboard the track to extricate himself from the soft sand.

II. DISCUSSION

Clarendon American Insurance Company (Clarendon) filed a motion for summary judgment, asserting that Nunez is not a seaman. Summary judgment is proper when, viewing the evidence in the light most favorable to the non-movant, "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 809 (5th Cir. 1991); Fed. R. Civ. P. 56(c). If the moving party meets the initial burden of establishing that there is no genuine issue, the burden shifts to the non-moving party to produce evidence of the existence of a genuine issue for trial. Celotex Corn. v. Catrett, 106 S.Ct. 2548, 2552 (1986). The nonmovant cannot satisfy his summary judgment burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). A fact is "material" if its resolution in favor of one party might affect the outcome of the lawsuit. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2510 (1986). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. Id. If the opposing party bears the burden of proof at trial, the moving party does not have to submit evidentiary documents to properly support its motion, but need only point out the absence of evidence supporting the essential elements of the opposing party's case. Saunders v. Michelin Tire Corp., 942 F.2d 299, 301 (5th Cir. 1991).

The question who is a "seaman" is a mixed question of law and fact. See McDermott Int'l, Inc. v. Wilander, 111 S.Ct. 807, 818 (1991). "When the underlying facts are established, and the rule of law is undisputed, the issue is whether the facts meet the statutory standard." Id. Seaman status depends "on the nature of the vessel and the employee's precise relation to it." Id. "If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a "member of a crew," it is a question for the jury." Id. Summary judgment is mandated when the facts and the law support only one conclusion. Id.

The key to seaman status is employment-related connection to a vessel in navigation." Id. at 817. "[A] necessary element of the connection is that a seaman perform the work of a vessel." Id. The work of a seaman need not be limited to transportation functions that aid in the vessel's navigation. See Chandris, Inc. v. Latsis, 115 S.Ct. 2172, 2181 (1995). "Whether under the Jones Act or general maritime law, seamen do not include land-based workers." Wilander, 111 S.Ct. at 814. Jones Act coverage depends on the nature of the seaman's service, his status as a member of the vessel, and his relationship to the vessel and its operation in navigable waters. Chandris, 115 S.Ct. at 2185. To qualify as a seaman, a maritime employee need not work only on board a vessel. Id at 2187. Those who obtain seaman status do not automatically lose the protection when on shore. Id. at 2185. "Thus, if the employee's regularly assigned duties require him to divide his time between vessel and land (or platform) his status as a crew member is determined in the context of his entire employment with his current employer." Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1075 (5th Cir. 1986). Based on these principles, there are two essential requirements for seaman status: 1) the employee's duties must contribute to the function of the vessel or the accomplishment of its mission, and 2) a seaman must have a substantial connection to a vessel in navigation in terms of its duration and its nature. Chandris, 115 S.Ct. at 2190.

Clarendon's challenge to Nunez's seaman status is based on the second prong of the Chandris test. Clarendon argues that 1) Nunez's connection with the vessel did not take him to sea, 2) his work brought him aboard the barge sporadically, and 3) he was injured on land at a spoil site approximately 50 feet from the edge of the waterway.[21]

The uncontroverted deposition testimony indicates that Nunez began his work with B&B as a roustabout and an operator on the rig with occasional responsibility for running the crewboat.[22] The dredge's crew consisted of two leadermen, who operate the barge; the crewboat operator; the dump foreman (the title which Nunez had at the time of the accident); and the roustabout, who assists the dump foreman.[23] During the two years that he worked for B&B, Nunez performed repair work on a small, unnamed, twelve-inch dredge for approximately two months; assisted in the construction the DREDGE BATON ROUGE for approximately 10 months; and worked on dredging assignments on the Mississippi River and in Florida.[24] Nunez worked twelve hour shifts when the dredge was in operation.[25] He took time off when the dredge was being moved from one job site to another because he did not participate in transporting the vessel to the new dredge site.[26]

Nunez traveled over water to and from the DREDGE

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4. The pipeline was ten miles long because it snaked around corn and cotton fields that had to be avoided. Deposition at 87.
5. Deposition at 32-33.
6. Deposition at 39.
7. Deposition at 50-59.
8. Deposition at 47.
9. Deposition at 81.

BATON ROUGE to report on the dump site's status, built levees to create new silt dump sites, and operated various B&B owned vessels. He occasionally ate his meals on the dredge; however, he did not sleep on the vessel during his employment.[27]

At the Florida location, Nunez was required to lay 1.0 miles of pipeline, which was carried to the site by barge and by truck as part of the project to dredge a section of the Intracoastal Waterway. The track hoe, which was positioned on land, was used to lift the pipe in a sling and transfer it to the banks of the waterway.[28] When the dredge arrived, Nunez made pontoon connections between the pipeline and the cutter head on the dredge in order to pump out the Intracoastal Canal.[29] Nunez worked on the Florida assignment approximately eight weeks before he was injured.[30] After the injury, he worked light duty operating a crew boat full time for the same employer until his employment was terminated.[31]

Clarendon does not dispute that B&B's barges are vessels in navigation, that Nunez was a member of the six-man crew employed by B&B at the three locations where dredging took place, and that Nunez's duties contributed to accomplishing the function of the vessel in dredging silt from waterways. Further, for two years, Nunez played an integral part in connecting and maintaining the pipeline through which the dredged material was delivered to the shore. His duties in the service of the dredge required him to work on the waterway between the dredge and the dump site and exposed him to the perils of the sea. Contrary to Clarendon's arguments, the questions concerning the percentage of time spent on the dredge, the meal arrangements,

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10. Deposition at 47-48, 96-97.

11. Deposition at 83.

12. Deposition at 90.

13. Deposition at 96.

14. Deposition at 125.

and sleeping accommodations are not determinative of seaman status. Additionally, the site of a seaman's injury does not bar him from his Jones Act seaman status.

Accordingly, Clarendon is not entitled to summary judgment on the issue whether Nunez is a seaman. A trier of fact could reasonably conclude from the evidence that Nunez was a permanently assigned crew member who contributed to the dredging mission and had a substantial employment connection to the dredge. The motion for summary judgment is denied.

New Orleans, Louisiana, this 29 day of November, 1999.

MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

APPENDIX F – AFFIDAVIT OF MILFRED NUNEZ FILED ON AUGUST 30, 1999 IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT FILED BY CLARENDON AMERICAN INSURANCE COMPANY

STATE OF LOUISIANA
PARISH OF ORLEANS

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned and qualified in and for the State and Parish aforesaid, personally came and appeared: MILFRED NUNEZ a person of the full age of majority and a resident of the Parish of St. Bernard who, after first being duly sworn, deposed and said that:

1. I am a Plaintiff in Civil Action No. 98-2572, United States District Court, Eastern District of Louisiana.

2. On September 4, 1997, I was injured in an accident during the course of my employment with B&B Dredging, Inc., ("B&B"), a defendant in the above referenced lawsuit.

3. I worked for B&B for a total of two years.

4. During the two years that I was employed by B&B, I was a permanently assigned crew member of their 12" dredge and then the dredge BATON ROUGE, another B&B vessel.

5. At all times during my employment with B&B, I was a member of the crew of either the 12" dredge or the dredge BATON ROUGE. I did not work for another employer at any time during the two years.

6. I remained a full time crew member when the 12" dredge was under repair for two months during the time I was employed by B&B.

7. I was a member of the crew which built the dredge BATON ROUGE.

8. Once the dredge BATON ROUGE was christened, I was a member of the crew of every project involving the dredge BATON ROUGE. Additionally, I remained a constant member

of the crew during the two weeks that the dredge BATON ROUGE underwent repairs when a tug boat collided with the dredge and caused damage.

9. During most of my two year employment with B&B, I held a position titled "dump foreman", and I was also an operator, a roustabout, and a deck hand. I was responsible for the operations of the dump sites, whether they were 10 miles inland or an island in the river. My duties also included operating a crew boat, operating a flat boat, operating a tugboat, fixing the pontoon line in the river between the dredge and the dump site, shifting the two swing anchors in the river to enable the dredge to move, building levees surrounding the dump sites near the edge of the river, and loading and unloading pipe from the dredge during dredging operations. I reported to my supervisor aboard the dredge BATON ROUGE at least twice each day. My duties required me to be on a vessel from 10 to 60 percent of the time I spent working on B&B projects.

10. I had an assistant who remained at the dump site and who would use a radio to contact me at the dredge if there was a problem at the dump site.

11. The fewer problems that arose at the dump site, the more time I spent on the dredge or handling the pontoon line between the river bank and the dredge.

12. The dredge BATON ROUGE had been contracted by the Corps of Engineers to dredge the intra-coastal waterway in Florida during when I was injured.

13. At least twice each day I traveled by vessel from the river bank to the dredge and then from the dredge to the dump site as part of my duties as a B&B crew member.

14. The entire trip over the water from the river bank to the dump site took 45 minutes to an hour and a half, depending on the current.

15. At least once per day, I assisted in adding one or two pipe lengths (approximately 100 to 200 feet) to the pontoon line in the river, using two vessels, usually the crew boat and the tug boat. This was required during dredging operations when the slack would run out in the pontoon line to the dredge, which would keep the dredge from moving or break the pipe line unless pipe lengths were added.

16. Whenever the operating dump site became full, my crew had to find a new dump site and move the operations there. This required building levees in the river near the shore in order to dump the silt being dredged form the bottom of the river. Thus, the dump site became an island. Moving to the new dump site entailed detaching the land pipe from the pontoon line in the river and moving the land equipment and the dredge to the new dump site in the river. At that point, the land pipe and the pontoon line would have to be reattached in the river by myself and the crew. Creating new dump sites was necessary between twenty to thirty times during the project for the Corps of Engineers.

17. After the injury which gave rise to this action occurred, I was assigned to light duty as a full time operator of the crew boat that carried crew members and supplies back and forth from the shore or the dump sites to the dredge BATON ROUGE

18. All statements attested to in this Affidavit are true and correct to the best of affiant's knowledge, information and belief.

OCT 25 2002

No. 02-296

IN THE

Supreme Court of the United States

MILFRED NUNEZ,

Petitioner,

v.

CLARENDON AMERICA INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Clarendon America Insurance Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioner, Milfred J. Nunez, is a land-based employee who worked as a dredge dump foreman in the service of a vessel, but who spent less than 10% of his time working aboard the vessel or subject to the unique hazards and perils of the sea. Congress did not intend to confer seaman status to land-based employees, like Nunez, with minimal exposure to the sea. The United States Court of Appeals for the Fifth Circuit, in accordance with the precedent established by this Honorable Court, agreed and found that "Nunez was not a Jones Act seaman."[1] The Fifth Circuit did not err in its finding nor does its finding conflict with any decision rendered by the Third or Ninth Circuit Courts of Appeals.

A. Proceedings Below

On August 28, 1998, Nunez filed suit in the United States District Court for the Eastern District of Louisiana against B&B Dredging, Inc. ("B&B") and its insurer, Clarendon America Insurance Company ("Clarendon"), alleging negligence under the Jones Act and General Maritime Law.[2] The Respondent, Clarendon, moved for summary judgment on August 9, 1999, arguing that the undisputed facts attained in Nunez's deposition established that he was not a seaman as a matter of law within the meaning of the Jones Act.[3] Nunez filed an opposition memorandum and attached a "Statement of Contested Facts," in which he outlined several self-serving facts that directly contradicted his deposition

1. Pet. App. A at 1a.

2. R. 263, 268.

3. R. 120, 127-131.

testimony.[4] Nunez claimed these facts, extracted from his affidavit, were material to the seaman status dispute. The trial court denied Clarendon's motion, finding material facts were in dispute.[5]

Upon the trial court's invitation, Nunez then filed his own motion for summary judgment on seaman status. Nunez offered the same self-serving affidavit testimony as uncontested material facts supporting a finding of seaman status.[6] The trial court granted Nunez's motion for summary judgment, effectively holding that the seaman status test in *Chandris* was disjunctive and thereby ignoring the temporal requirement.[7] Clarendon appealed to the United States Court of Appeals for the Fifth Circuit.[8]

The Fifth Circuit held that

> [f]or a worker such as Nunez who divides his work time between the shore and the vessel, he must demonstrate that he spends a substantial part of his work time aboard the vessel in order to demonstrate that he has the requisite connection to a vessel in order to qualify for seaman status.[9]

The Fifth Circuit found that Nunez's time aboard the vessel was an insubstantial part of his work time and that he did

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4. R. 52, 74.

5. R. 25.

6. R. 699-707.

7. R. 658-666.

8. R. 847.

9. Pet. App. A at 8a.

not, therefore, qualify as a seaman as a matter of law.[10] Because the Court found Nunez's contradictory affidavit testimony did not create a genuine issue of material fact to justify a trial, judgment was rendered in favor of B&B. Nunez's Motion for Reconsideration was denied, and he filed the present Petition.

B. The Material Facts Support the Singular Conclusion that Nunez is NOT a Seaman

The only evidence before the trial court and the Fifth Circuit relating to Nunez's seaman status was his deposition testimony and a contradictory, self-serving, and conclusory affidavit drafted *after* Nunez's deposition. Nunez was employed by B&B for approximately two years (twenty-three months) prior to his accident.[11] Approximately fifteen months of this time was spent on vessel construction and yard work, during which time Nunez spent 100% of his time on land.[12] During the remaining eight months with B&B, Nunez spent 90% of his time working on land.[13]

A chronological view of Nunez's work history with B&B, derived from Nunez's deposition testimony, establishes unequivocal support for a finding that Nunez barely worked on vessels during his employment and as such is not entitled to the protection afforded seaman regularly exposed to the perils of the sea:

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10. *Id.*

11. R. 318.

12. *See* Nunez's Deposition, R. 334-339, 365-366.

13. *See* Nunez's Deposition, R. 354, 359, 369, 373.

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10. *Id.*

11. R. 318.

12. *See* Nunez's Deposition, R. 334-339, 365-366.

13. *See* Nunez's Deposition, R. 354, 359, 369, 373.

- **3 Months:** working 90% on land for Continental Grain job.
- **2 Months:** working 100% on land, repairing drill pipe in a yard.
- **10 Months:** working 100% on land, construction of DREDGE BATON ROUGE.
- **7 Weeks:** working 90% on land at dredge spoil site, maiden voyage of vessel.
- **1 Month:** working 100% on land, repairing slings and pontoons.
- **8 Weeks:** working 90% on land, dump foreman at dock site.
- **1 Month:** working 100% on land, securing supplies for dredge operation.
- **2 Weeks:** "Off Work" while dredge towed to Florida job.
- **1 Month:** working 100% on land, laying drill pipe on land; awaiting arrival of vessel in Florida.
- **2 Months:** working 90% on land, dump foreman 10 miles from dredge in Florida.[14]

For the eight months in which Nunez was not *100% of the time on land*, he performed *90% of his work on land* as a dredge dump foreman. Nunez described his dump foreman job duties as monitoring the land-based dredge spoil area and adding additional segment to the dredge pipe to begin a new pile of dredge spoil on land.[15] Nunez's land based duties

14. For a more detailed narrative of Nunez's employment history with B&B, *see* Nunez's Deposition, R. 318-381.

15. Nunez's Deposition, R. 323-325.

also included driving a truck for four to five hours a day or overlooking the land construction site.[16]

At the Florida job where Nunez sustained his injury, Nunez testified that he spent 90% of his time as the dump foreman at the dredge spoil site located *ten miles* from the DREDGE BATON ROUGE.[17] The remaining 10% of Nunez's working day was spent traveling across water for 10-15 minutes a day to receive instructions from his supervisor or occasionally to eat meals aboard the vessel.[18] Nunez resided at a Quality Inn for this job and ate most of his meals at the land-based dredge spoil site.[19]

After his deposition, Nunez executed an affidavit aimed directly at contradicting his own deposition testimony.[20] In this affidavit, Nunez repeatedly referred to himself as a "member of the crew" of B&B vessels.[21] This is clearly a

16. Nunez's Deposition, R. 342-344.

17. Nunez's Deposition, R. 373.

18. Nunez's Deposition, R. 412.

19. Nunez's Deposition, R. 381.

20. Nunez's Deposition, R. 110 or 738.

21. *Id.* The phrase "member of the crew" is synonymous with Jones Act Seaman status. The term "member of the crew" was initially defined in the context of the LHWCA in *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991 (1st Cir. 1941). Since that time, it has become clear that the phrase "member of the crew" is synonymous with the term "seaman" and courts have "universally recognized" the *Carumbo* definition of the term. *Chandris*, 515 U.S. at 364-67, 115 S. Ct. at 2188-89.

legal conclusion that carries no weight in the determination of seaman status. Nunez claims, contrary to his deposition testimony, that he spent 10 to 60 percent of his time on a vessel while working on B&B projects. Nunez also retracted his deposition testimony regarding his excursions to the dredge vessel, claiming his trip to the vessel took not 10-15 minutes a day, but 45 minutes.[22]

Nunez's deposition inquiries and answers thereto were clear and consistent. Nunez provided no explanation for his contradictory and self-serving affidavit testimony. The law of this Honorable Court and of the Circuit Courts is unequivocal that Nunez's affidavit testimony is not sufficient to create a material fact.[23] The court's role at summary judgment stage is to determine if a genuine issue of material fact exists. The Fifth Circuit was clearly exercising its sanctioned discretion in finding that Nunez's affidavit testimony did not create a disputed material fact. Nunez's sworn deposition testimony established sufficient uncontested material facts warranting denial of seaman status. Allowing Nunez to defeat summary judgment by proffering self-serving contradictory evidence would create a manifest injustice and render the summary judgment procedure untenable.

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22. Deposition, R. 412; Affidavit, R. 110.

23. *See* footnote 42, *infra*, and accompanying text.

REASONS FOR DENYING THE PETITION

A. The U.S. Fifth Circuit Correctly Applied the Law

"A maritime worker who spends only a small fraction of time on board a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are." *Chandris*, 515 U.S. at 371, 115 S. Ct. at 2191. This axiom governs the analysis of Nunez's seaman status.

This Honorable Court delineated a two-prong test to determine whether an employee is a seaman within the meaning of the Jones Act in *Chandris, Inc. v. Latsis*:[24]

1. First . . . an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission.

2. Second . . . a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

Chandris, 515 U.S. at 368, 115 S. Ct. 2172.

This test was reiterated and affirmed in *Harbor Tug and Barge Co. v. Papai*,[25] in which this Court clarified the identifiable fleet doctrine. This Court held:

> For the substantial connection requirement to serve its purpose, the inquiry into the *nature* of the

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24. 515 U.S. 347, 368, 115 S. Ct. 2172, 2190 (1995).

25. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 137 L. Ed. 2d 800, 117 S. Ct. 1535 (1997).

> employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to the *duration and nature* of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.[26]

This Court did not retract the temporal requirement created in *Chandris*, nor did this Court hold that if an employee works 100% of his time in the service of a vessel, but on land, that he is a seaman. *Harbor Tug* highlighted the importance of the nature of an employee's duties to the service of a vessel in satisfying the substantial connection requirement.

Realizing his inability to meet the temporal requirement mandated by this Court in *Chandris*, affirmed in *Harbor Tug*, and adhered to by the Fifth Circuit, Nunez attempts to evade the fact that he had no substantial connection in duration to B&B vessels. To accomplish this feat, Nunez attempts to: (1) circumvent the durational/temporal element of the seaman test by arguing that 100% of his time was "in the service of the vessel"; and (2) create a conflict in the Circuits where one does not exist.

To satisfy the first prong of the *Chandris* test, a worker need only show that he performs the ship's work.[27] This threshold requirement has been characterized as "very broad."[28] Clarendon does not dispute that as a dump foreman, monitoring the silt

26. *Id.* at 555.

27. *Chandris*, 515 U.S. at 368, 115 S. Ct. 2172.

28. *Id.*

discharged from dredge pipe, even a dredge line which runs ten miles from the dredge, is work which might fairly be characterized as the dredge's work. Nunez's seaman status will, therefore, hinge on the second prong of the *Chandris* test.

The second prong of the *Chandris* test is intended to "separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation."[29] As this Court reasoned in *Chandris*:

> The total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon. . . . The duration of the worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.

Chandris, 515 U.S. at 370 (citations omitted).

Although Nunez attempts to argue otherwise, the temporal aspect of a seaman's connection to a vessel in navigation is essential. This court was unequivocal in its holding that an employee, in addition to working "in the service of the vessel", must have a substantial connection to

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29. *Id.*

the vessel **both** in terms of nature and duration. This requirement determines which employees eligible under the first prong or element of the *Chandris* test are entitled to the benefits conferred upon seaman. This temporal element is separate from the *nature* of the employee's work and must also comprise a substantial portion of the employee's job. To satisfy this temporal requirement, the employee must spend a substantial part of his work time aboard the vessel. Nunez cannot ignore this Court's clear directive that a seaman's connection to a vessel must be substantial in duration. This Court stated:

> We agree with the Court of Appeals that seaman status is not *merely* a temporal concept, but we also believe that it necessarily includes a temporal element. A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are.

Chandris, 515 U.S. at 372.

To accept Nunez's argument that if a worker performs 100% of his work in the service of the vessel, even if on land, then he is a seaman, this Court must remove the temporal requirement established in *Chandris* and delineate a new directive for seaman status. As noted by the Fifth Circuit, adopting Nunez's interpretation would "expand the ranks of potential Jones Act seaman to all employees who further the mission or function of the vessel from salesman to payroll clerks to corporate executives. Neither the law of the Supreme Court or of this Circuit will permit such a bizarre result."[30]

30. Pet. App. A at 8a.

Nunez's own admissions support the singular finding that his sea-faring activities do not satisfy the substantial temporal requirement of the *Chandris* test. Nunez's excursions to the DREDGE BATON ROUGE were simply to report the status of the land-site and to receive instructions from crew members aboard the vessel. Like the employee in *Harbor Tug*, the nature of Nunez's connection to the vessel was not substantial for seaman-status purposes: Nunez did not go to sea aboard the vessel, nor did he perform any regular job duties aboard the vessel during his trips to the anchored vessel. Nunez did not face regular exposure to the perils of the sea. The Fifth Circuit has consistently denied seaman status to employees whose service to a vessel encompassed more substantial time aboard a vessel, performing more traditional sea-farer duties.[31]

The Fifth Circuit, adhering to its established precedent as sanctioned by this Honorable Court, refused to extend the protection afforded seaman to Nunez, who clearly does not fall within the class of persons sought to be protected by the Jones Act. The Fifth Circuit has repeatedly held that seaman status should be denied to employees who spend less than 30% of their time on vessels.[32]

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31. *See* footnote 35, *infra*.

32. *See Barrett v. Chevron, Inc.*, 781 F.2d 1067, 1076 (5th Cir. 1986) (en banc) (denying seaman status to an employee who spent less than 20 to 30% of his time working on vessels); *see, e.g., Palmer v. Fayard Moving and Transportation Corp.*, 930 F.2d 437, 439 (5th Cir. 1991) (denying seaman status to a plaintiff who performed 19% of her work on a vessel even though her duties included frequent trips to the vessel to order food and beverages and prepare the vessel for voyages); *Lormand v. Superior Oil Co.*, 845 F.2d 536 (5th Cir. 1998) (denying seaman status to a welder who spent 14% of his time working on vessels).

This Honorable Court has sanctioned the Fifth Circuit's interpretation of the temporal element of the *Chandris* test, finding:

> Generally, the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act.[33]

B. There Were No Genuine Issues of Material Fact

It is generally recognized that seaman status is a mixed question of law and fact which in the ordinary course should not be taken from the jury. *Harbor Tug & Barge Company v. Papai*, 520 U.S. 548, 117 S. Ct. 1535, 1540 (1997). Nevertheless, this Court has held that "[s]ummary judgment . . . is mandated where the facts and the law will reasonably support only one conclusion."[34] Similarly, the Fifth Circuit has held that where there is no reasonable evidentiary basis to support a jury finding that the injured worker is a seaman, summary judgment denying seaman status is proper.[35]

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33. *Chandris*, 515 U.S. at 372.

34. *Id.* at 371 (quoting *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)).

35. *Lormand v. Superior Oil Company*, 845 F.2d 536, 539-40 (5th Cir. 1987), citing *Garret v. Dean Shank Drilling Co.*, 799 F.2d 1007 (5th Cir. 1986); *Reynolds v. Ingalls Shipbuilding Division*, 788 F.2d 264, 267 (5th Cir.), *cert denied*, 107 S. Ct. 278, 93 L. Ed. 2d 253 (1986); *Barrett v. Chevron, U.S.A.*, 781 F.2d 1067, 1074 (5th Cir. 1959).

And where undisputed facts reveal that a maritime worker has a clearly inadequate temporal connection to vessels in navigation, the court may take the question from the jury by granting summary judgment or a directed verdict.[36]

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[37] The party seeking summary judgment bears the burden of establishing the absence of any disputed material fact.[38] At summary judgment stage, the judge's function is not himself to read the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.[39] Although the court must resolve all factual inferences in favor of the nonmovant, the nonmovant cannot manufacture a disputed material fact where none exists.[40]

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36. *See, e.g., Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437, 439 (5th Cir. 1991).

37. Fed. R. Civ. P. 56(c).

38. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970).

39. *See Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511, 477 U.S. 242, 249, 91 L. Ed. 2d 202 (1986).

40. *Albertson's v. T.J. Stevenson Co., Inc.*, 749 F.2d 233 (5th Cir. 1984), citing *Russell v. Harrison*, 736 F.2d 283, 387 (5th Cir. 1984).

The nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony.[41] The nonmovant cannot manufacture a disputed material fact where none exists.[42] As this Honorable Court has noted, the Circuit Courts

> have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity.[43]

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41. *Id.*, *citing Kennett-Murray Corp. v. Vone*, 622 F.2d 887, 894 (5th Cir. 1980). *See also Van T. Junkins & Associates, Inc. v. U.S. Industries, Inc.*, 736 F.2d 656, 657 (11th Cir. 1984); *Vanlandigham v. Ford Motor Co.*, 99 F.R.D. 1, 3 (N.D. Ga. 1983).

42. *Id.*, citing *Russell v. Harrison*, 736 F.2d 283, 287 (5th Cir. 1984).

43. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806, 119 S. Ct. 1597, 1603, 143 L. Ed. 2d. 966 (1999), citing *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 5 (1st Cir. 1944); *Rule v. Brine, Inc.*, 85 F.3d 1001, 1002 (2d Cir. 1996); *Hackman v. Valley Fair*, 932 F.2d 239, 241 (3d Cir. 1991); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984); *Albertson's v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984); *Davidson & Jones Development Co. v. Elmore Development Co.*, 921 F.2d 1343, 1352 (6th Cir. 1991); *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1297 (7th Cir. 1993); *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365-1366 (8th Cir. 1983); *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262 (9th Cir. 1991); *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986); *Tippens v. Celotex Corp.*, 805 F.2d 949, 953-954 (11th Cir. 1986); *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123 (C.A.D.C.), *cert. denied*, 502 U.S. 822, 112 S. Ct. 85, 116 L. Ed. 2d 57 (1991); *Sinskey v. Pharmacia Opthalmics, Inc.* 982 F.2d 494, 498 (C.A. Fed. 1992), *cert. denied*, 508 U.S. 912, 113 S. Ct. 2346, 124 L. Ed. 2d 256 (1993).

Nunez submitted affidavit testimony that could not be reconciled with his deposition testimony. Without explanation, this presentation of a self-serving affidavit cannot and did not create a genuine issue of material fact.

Upon reviewing a summary judgment, the Fifth Circuit is granted the discretion to determine if a genuine factual issue exists or if the evidence presented is of insufficient caliber to allow a rational finder of fact to weigh the evidence. Federal Rule of Civil Procedure 56(c) by its very terms provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. The requirement is that there be no *genuine* issue of *material fact*. Under this Court's jurisprudence, *Cleveland*, *supra*, the district court had no credible basis to find a genuine issue of material fact. The Fifth Circuit correctly found that Nunez's self-serving affidavit did not create a genuine issue of material fact sufficient to prevent summary judgment, and properly reversed and remanded judgment in favor of B&B.

C. There is No Conflict Among the Circuits

Nunez asserts that the Fifth Circuit failed to properly apply the *Chandris* test, thereby establishing a conflict with the Third and Ninth Circuits. Contrary to this assertion, both Circuits interpret and apply the *Chandris* test similarly to the Fifth Circuit.

1. The Third Circuit's Application of *Chandris* and *Papai*

Nunez directs this Court to the Third Circuit case of *Shade v. Great Lakes Dredge & Dock Co.*[44] in a failed attempt to analogize his work duties with that of the *Shade* plaintiff, who was assigned to a vessel and worked primarily on the water. The *Shade* plaintiff worked on the water assisting the repair of a submersible dredge line while assigned to an anchor barge. Both the *Shade* plaintiff and his supervisor testified that plaintiff was employed primarily on navigable waters, spending 90% of his time on the water. This stands in stark contrast to Nunez's deposition testimony that he spent less than 10% of his time on board the vessel.[45] The employer in *Shade* appealed the trial court's denial of his motion for summary on seaman status claiming that under the first prong of the *Chandris* test, the fact finder must only consider activities of an employee at the time of his injury. Shade's employer argued that the plaintiff failed to satisfy the seaman status test because he was injured while working on the shore. The Third Circuit found that the fact finder must not confine its analysis to an employee's duties only at the time of the accident, but must include all duties performed during an employee's assignment with his current employer. The Court found that the plaintiff presented sufficient evidence that he contributed to the function of the vessel and spent a considerable amount of time working on the water as a deckhand to support a finding hat he satisfied *both* the first and second prongs of the *Chandris* test. Unlike the Fifth Circuit in Nunez, the Third Circuit found sufficient evidence

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44. 154 F.3d 143 (3d Cir. 1999).

45. *See* Nunez's deposition, R. 354, 359, 369, 373.

to satisfy each prong of the seaman status test and held the district court correctly denied the employer's motion for summary judgment.[46]

The Third Circuit did not find, as Nunez contends, that a primarily land-based employee satisfied either prong of the *Chandris* test nor did the Court ignore the temporal requirement of the *Chandris* test.[47] The Third circuit noted "[i]n addition, the second portion of the test contains a **direct measurement** of time through its durational element."[48] The Third Circuit's seaman status analysis accords with that of the Fifth Circuit. In fact, the Third Circuit specifically references several Fifth Circuit seaman status decisions as support for its interpretation and application of *Chandris*.[49] Nunez's argument that the Third Circuit's application of the seaman test to his facts would render a different result than the Fifth Circuit's fails.

By referencing *Foulk v. Donjon Marine Co., Inc.*,[50] Nunez attempts to align himself with an employee whose

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46. The Third Circuit ultimately reversed the trial court's decision because the trial court improperly admitted evidence of prior employment history. The case was remanded for a new trial. *Id.* at 155.

47. Nunez's Petition misstates the *Shade* plaintiff's employment conditions: "[p]laintiff - Shade . . . was *primarily a shoreman*. . . ." Pet. App. p. 12. (emphasis added)

48. *Shade v. Great Lakes Dredge & Dock, Co.*, 154 F.3d 143, 147 (3d Cir. 1999).

49. *Shade*, 154 F.3d at 149.

50. 144 F.3d 252 (3d Cir. 1997).

work was maritime in nature and who was exposed to the perils of the sea the majority of his relevant employment. The *Foulk* plaintiff was a commercial diver, and it was undisputed that his work contributed to the function of the vessel and that his connection to the vessel was substantial in its nature. The *Foulk* plaintiff was injured on the first day of a ten day dive assignment. If the ten day job had been completed, the *Foulk* plaintiff would have spent 100% of his assignment on a vessel or in the water. The district court held that ten days was a "clearly inadequate temporal connection to vessels in navigation, sufficient to take the question from the jury by granting summary judgment." The Third Circuit reversed and held that ten days may be sufficient to satisfy the second prong of the *Chandris* test, and the determination should, therefore, be heard by a jury.

Unlike *Foulk*, the length of employment is not an issue in the case at bar. What is at issue is the time Nunez spent while employed with B&B aboard vessels performing maritime work as opposed to on land. Nunez cannot be compared to the traditional maritime worker in *Foulk* who spent 100% of his working time performing traditional maritime work in the service of a vessel either aboard a vessel or in the water. The *Shade* and *Foulk* cases do not present a conflict between the Third and Fifth Circuits, and Nunez's attempt to manufacture such a conflict fails upon a fair reading of the Third Circuit's jurisprudence.

2. The Ninth Circuit's Application of *Chandris* and *Papai*

Nunez argues that the Ninth Circuit's interpretation of the seaman status test post-*Papai* creates a conflict with the Fifth Circuit and, if applied to the present facts, would

necessitate a finding that Nunez is a Jones Act seaman. Specifically, Nunez argues that the Ninth Circuit's holding that "a worker's duties take him to sea if they are 'inherently sea-based activities'" is determinative of seaman status and precludes any temporal analysis by the Court. This assertion is not consistent with the Ninth Circuit's application of *Chandris* and *Papai* and directly contradicts the conjunctive test established by this Court.

Nunez represents that the Ninth Circuit condones an interpretation that the substantial temporal requirement of *Chandris* is satisfied if a worker's duties, however infrequent, take him to sea. This is a mis-characterization of the Ninth Circuit's jurisprudence. The Ninth Circuit considers whether an employee's duties take him to sea for the substantial connection in nature element of the seaman status test, not for the temporal requirement. "Whether the **nature** of a connection is substantial depends primarily on . . . whether the worker's duties take him to sea."[51] Like the Fifth Circuit, the Ninth Circuit assesses the substantiality of an employee's connection to a vessel in time by calculating the percentage of working time spent on vessels. "Whether the **duration** of a connection is substantial depends largely on the percentage of working time spent on vessels for the employer in question."[52]

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51. *Lorimer v. Great Lakes Dredge & Dock Co.*, 2002 U.S. App. Lexis 10775 (9th Cir. 2002), citing *Harbor Tug*, 520 U.S. at 555, 117 S. Ct. 1535.

52. *Lorimer v. Great Lakes Dredge and Dock Co.*, 36 Fed. Appx. 294, 295, 2002 WL 1164100, *1 (9th Cir. 2002), citing *Harbor Tug*, 520 U.S. at 556-57, 117 S. Ct. 1535; *Chandris*, 515 U.S. at 371-72, 115 S. Ct. 2172. The *Lorimer* plaintiff spent 100% of his working

(Cont'd)

Plaintiff cites *Delange v. Dutra Construction Co.*[53] in support his argument. In *Delange*, the Ninth Circuit held that a land-based employee who spent 80% of his time working aboard a vessel could maintain a supplemental Jones Act claim in addition to his LHWCA claim. *Delange* presents another case in which the plaintiff actually worked on board a vessel. As the Ninth Circuit noted, Delange spent 80% of his time on board the barge, performing crewman and deckhand duties.[54] The Ninth Circuit reversed the trial court's finding that the plaintiff failed to satisfy the requirement that his duties contributed to the function of the vessel or to the accomplishment of its mission because the ultimate purpose of his work was relating to construction. The Ninth Circuit found that the plaintiff worked directly in the service of the ship, that a reasonable jury could find these facts supported seaman status, and remanded the cause for trial.

(Cont'd)
time on board the dredge vessel, which starkly contrasts Nunez's time aboard B&B vessels. *Id.* The Ninth Circuit specifically referenced the 30% rule in a recent unpublished opinion. "We reject [plaintiff's] argument that he satisfied the 30 % 'rule of thumb' established in *Chandris*." *Gipson v. Kajima Engineering and Construction, Inc.*, 173 F.3d 860, *1 (9th Cir. 1999), citing *Chandris*, 515 U.S. at 371.

53. 183 F.3d 916 (9th Cir. 1999).

54. The Ninth Circuit's reference to the percentage of time Delange spent on board the vessel (80%) contradicts any implication that the Ninth Circuit's analysis does not account for a comparison of the employee's time on land versus his time on board a vessel in navigation.

In conclusion, *Delange*, like *Shade* and *Foulk* from the Third Circuit, applies the temporal requirement similar to the Fifth Circuit. What distinguishes all of these cases from Nunez is that each of those plaintiffs satisfied the 30% rule of thumb. Therefore, the Circuit decisions were based upon other factors delineated in the *Chandris* test. The *Chandris* test is a conjunctive test. Nunez failed to satisfy one prong of the test rendering further analysis moot. Nunez cannot satisfy the temporal requirement by claiming that his duties took him to sea. That inquiry is reserved for the first prong of the *Chandris* test. Nor can Nunez satisfy the temporal requirement by submitting contradictory self-serving statements to rebut his deposition testimony.

Without any real support from any jurisprudence in the nation, Nunez asks this Court to ignore the substantial duration requirement of the *Chandris* test and find that an employee is a seaman if his work contributes to the function of the vessel. To remove this element would render the first and second prongs of *Chandris* redundant and would not serve the goal of separating seafarers from land-based employees. Contrary to the Petitioner's argument, neither the Third nor the Ninth Circuit has eschewed the temporal requirement or reversed the grant of summary judgment for any claimant akin to Nunez.

Nunez's attempt to retract his deposition testimony and paint his land-based employment in a different light is at best a misrepresentation. It does not create an issue of fact. In the discretion granted it by both *Anderson* and *Celotex*, the Fifth Circuit refused to find Nunez's contradictory evidence material. Nunez's appeal to this Court to overturn the decision of the Fifth Circuit based on a tortured interpretation of the Third and Ninth Circuit's application of

the *Chandris* test to anomalous fact patterns is untenable and should be rejected. This Court has approved of the Fifth Circuit's consistent interpretation of the substantial duration requirement. A fair reading of the Third and Ninth Circuit decisions is consistent with this Court's jurisprudence and the Fifth Circuit's application of the *Chandris* test in this case.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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No. 02-296

In The

Supreme Court of the United States

OCTOBER TERM, 2002

MILFRED J. NUNEZ
Petitioner

v.

CLARENDON AMERICA INSURANCE COMPANY
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION OF MILFRED J. NUNEZ FOR A WRIT OF CERTIORARI

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November 22, 2002

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PURPOSE OF THIS REPLY BRIEF

If the decision below is allowed to stand, it will be the first case in which different members of the crew of the same vessel will be treated disparately relative to their seaman status depending on the duties undertaken while admittedly in the service of a vessel engaged in the traditional maritime work of dredging.

The standards established by this Court focus on the predictability, prior to the voyage in question, by both employer and employee, of whether a particular worker is a seaman or is a land-based worker ineligible for seaman status. These would be defeated if such a determination must be made in and during each voyage and in the context of the percentage of time that a particular maritime worker and member of the crew spends, not just in the service of the vessel, but actually on board the vessel itself.

As in the case sub judice, where it has been admitted by the respondent that the injured person is a member of the crew of the Dredge Baton Rouge whose work contributed to the service of the vessel on which he served, a test, such as that established by the court of appeals that relies only on the measure of time on the vessel to the exclusion of a consideration of permanent connection to the vessel and work exclusively in the service of the vessel, departs from the settled jurisprudence of this Court and creates a conflict with the Third and Ninth Circuit Courts of Appeal.

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ARGUMENT

The crew of the Dredge Baton Rouge consisted of two leadermen, who operated the barge, the crew boat operator, the dump foreman (the title which petitioner had at the time of the accident), and the roustabout, Guillot, who assisted the dump foreman.[1] In granting summary judgment, the district court stated:

> Clarendon does not dispute that B&B's barges are vessels in navigation and that Nunez was a member of the six-man crew employed by B&B at the three locations where dredging took place.[2]

Although both Mr. Nunez and Mr. Guillot were members of the crew, who owed complete, exclusive, and singular fidelity over an extended period of time to the Dredge Baton Rouge, the Fifth Circuit found Mr. Nunez was not a seaman. Using its rational, Mr. Guillot would also not be considered a seaman. It is certainly a novel idea that one third of the members of the crew of a vessel doing the work of the vessel are not seamen.

This is contrary to the standards established by this Court that focus on the predictability, prior to the voyage in question, by both employer and employee of whether a particular worker is a seaman or is a land-based worker ineligible for seaman status.

> In evaluating the employment-related connection of a maritime worker to a vessel in navigation, courts should not employ "a 'snapshot' test for seaman status, inspecting only the situation as it exists at the instant of injury; a more enduring relationship is contemplated in the jurisprudence." *Easley, supra*, at 5. Thus, a worker may not oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the

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[1] App. 32(a), opinion granting summary judgment on seaman status.

[2] App. 34(a),

worker was engaged while injured.

Chandris v. Latsis, 515 U.S. 347, 363, 115 S.Ct. 2712, 2187, 132 L. Ed. 2d 314 (1995)

The court of appeal rationalized its exclusion of crew members from seaman status as follows:

> If we were to accept Nunez's argument, we would expand the ranks of potential Jones Act seamen to all land-based employees who further the mission or function of the vessel, from salesmen to payroll clerks to corporate executives. Neither the law of the Supreme Court or of this Circuit will permit such a bizarre result. (App. 8a.)

Nunez was not just a person who furthered the mission or function of the vessel. As conceded by Respondent, Mr. Nunez was a member of the crew. He was also subject to the perils of the sea in his employment and was injured by one of them. The requirement that a maritime worker be a member of the crew eliminates all of the other land-based employees, "from salesmen to payroll clerks to corporate executives." Regrettably the "bizarre result" is denying seaman status to a member of the crew of the Dredge Baton Rouge who spendt his full time in the service of the vessel and whose work as a crew member furthered the mission of the vessel.

An injured worker has traditionally been required either to be a member of the vessel's crew "or" to spend a substantial part of his time assigned to a particular vessel or flotilla of vessels; hence, the *Barrett* opinion, which held that for non-crew members, a thirty percent rule should be, more or less, applied. However, there was an unstated implication *a contrario* that crew members need not pass the thirty percent rule, because when a vessel is truly the base of a seaman's operations, he would routinely be exposed to the perils of the sea, as was Nunez.

As stated by this Court:

The principal formulations employed by the Courts of

> Appeals--"more or less permanent assignment" or "connection to a vessel that is substantial in terms of its duration and nature"-- are simply different ways of getting at the same basic point. *Chandris*, 515 U.S. at 369-370.

This decision is the first and only holding where a permanently assigned crew member of a vessel in navigation has been held not to have a substantial connection to the vessel. Nunez's connection to the vessel was not transitory or sporadic; it was his daily base of operation and the focus of his work.

"[T]he ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time." *Chandris*, 515 U.S. at 370.

Respondent's argument circumvents this notion and relies on the sole assertion that Mr. Nunez admitted in a deposition, when he was clearly confused, that. at a certain point in time, he spent only ten percent of his time aboard the vessel, not including his travel to and from the vessel nor the time he spent working the dredge lines in the River, all of which clearly related to his duties as a crew member of the dredge.

The Court will also note that the district court concluded correctly that there was sufficient evidence of seaman status for her to grant a summary judgment on that issue. This means that Nunez has never had a day in court to offer an explanation of the mischaracterized deposition testimony relied on by respondent. Further, Mr. Nunez's deposition was not the only evidence submitted. Mr. Nunez's Affidavit and that of the vessel captain, Roland Nunez, are part of the summary judgment record and further illustrate Mr. Nunez's duties and temporal connection to the vessel. They set forth in detail the various occasions wherein the plaintiff spent upwards of sixty percent of his time aboard the vessel contributing to the function of the vessel. In the absence of any rebuttal to this evidence by respondent, the District Court granted summary judgment on seaman status, thereby dispensing with a trial on this issue.

CONCLUSION

This court should overturn the untoward result of the Fifth Circuit's decision which will result in crew members of the same vessel being treated differently as a matter of law. Alternatively, Applicant requests that this matter be remanded for a trial on the merits on the factual issue of seaman status.

Petitioner therefore requests that this Court grant his Petition for Certiorari.

Respectfully submitted,

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